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In the
SUPREME COURT OF THE UNITED STATES
October Term 1982

BURTON VIESTENZ,

Petitioner,

v.

FLEMING COMPANIES, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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Date: September 15, 1982

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QUESTION PRESENTED

Was the District Court without jurisdiction to enter judgment on the jury verdict for a union member's tort action against his employer for intentional infliction of emotional distress?

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No.

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BURTON VIESTENZ,

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v.

FLEMING COMPANIES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, Burton Viestenz, prays that a Writ of Certiorari issue to review the opinion and judgment

of the United States Court of Appeals for the Tenth Circuit entered in these proceedings on June 22, 1982.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 681 F.2d 699, (10th Cir. 1982) and is set forth commencing at page A-1 of the Appendix hereto. The pertinent opinions of the United States District Court for the District of Kansas are unpublished and are set forth at pages A-24 and A-54 of the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was rendered on June 22, 1982,

and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the branch of the doctrine of federal preemption concerning the primary jurisdiction of the N.L.R.B. under the National Labor Relations Act (29 USCS §§ 151 et seq.), specifically 29 USCS §§157-160, pertinent portions of which are set out commencing at page A-69 of the Appendix hereto.

STATEMENT OF THE CASE

This diversity action between a union member/employee and his former employer arises out of a custodial interrogation in which

petitioner, Mr. Viestenz, was coerced into signing a false confession of theft under intimidation and duress of threatened termination of employment, black listing, court action, adverse publicity, and false accusations of theft - all in retaliation for Mr. Viestenz' reporting his employer to the union for union contract violations. This interrogation was conducted by a representative of respondent/employer, Fleming Companies, Inc. (Fleming), one Mr. Hollingsworth of Sentinel Security Services, Inc.[1] The day after the custodial interrogation, Mr. Viestenz was discharged from his employment.

Mr. Viestenz, a Missouri resident, brought this action in the United

---

[1] Not a question on this appeal is Fleming's claim that Hollingsworth was an independent contractor, not an employee or agent of Fleming, and that Fleming was not responsible under law for his conduct.

States District Court for the District of Kansas aginst defendant Fleming, a Kansas corporation under 28 U.S.C. § 1332. The complaint alleged the tort of wrongful discharge in Count I and the tort of outrage (intentional infliction of emotional distress) in Count II.

Fleming moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim. The District Court dismissed the claim for wrongful discharge in Count I for plaintiff's failure to exhaust his contractual remedies under the collective bargaining agreement; the propriety of that ruling is not an issue. The District Court refused to dismiss the claim for the tort of outrage in Count II, ruling that the intentional tort alleged fell outside the scope of the arbitration clause of the collective bargaining agreement and

at the same time, fell within the Farmer v. Carpenters, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) exception to the preemption doctrine. (Appendix A-24 at p. A-50).

The case proceeded to jury trial. Evidence presented at trial supported Mr. Viestenz' claim that the acts alleged were committed and were in retaliation of Mr. Viestenz' reporting Fleming to the union for union contract violations. Fleming denied same and presented evidence to support its claim that the interrogation was merely an interview motivated by Mr. Viestenz' theft of merchandise on the job.

The District Court's instructions to the jury specifically stated Fleming could only be liable if the conduct of Hollingsworth during the interrogation was found to be

extreme and outrageous, and was not liable for any wrongful discharge (Appendix A-65 - 68). The jury found for the plaintiff, Mr. Viestenz, and awarded $5,000.00 compensatory and $50,000.00 punitive damages.

On Fleming's motion, the District Court denied a new trial and JNOV, stating the jury was free to believe that Mr. Viestenz was coerced into making a false statement by the actions of Hollingsworth and specifically finding the jury could properly determine this conduct by Hollingsworth was outrageous; however, the District Court granted a remittiter to $2500.00 compensatory and $25,000.00 punitive damages, which plaintiff accepted. (Appendix A-54).

Fleming perfected an appeal to the United States Court of Appeals for the Tenth Circuit, urging six reasons for

reversal. The Tenth Circuit reversed on the sole ground that the District Court was without jurisdiction because the claim did not satisfy the Tenth Circuit's view of the requirements of the Farmer exception to the Garmon preemption rule. Without finding any passion and prejudice by the jury, nor any abuse of discretion by the trial court, the Tenth Circuit simply announced the conduct was not sufficiently outrageous and the harm suffered by Mr. Viestenz resulted from his discharge. (Appendix A-1 at p.A-18-21).

The facts stated in the opinion of the Tenth Circuit (Appendix A-1) are not those most favorable to and in support of the verdict for Mr. Viestenz.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is Not In Accord With Applicable Decisions

Of This Court Because It Ignores This Court's Policy Decision That Jurisdiction Over The Tort Of Outrage Is Not Preempted, And Instead Lays Down A New Standard Whereby Each Court Will Determine Jurisdiction Based On Its Individual Views Of Federal Labor Policy; This Has Substantial Practical Consequences For All Courts And Litigants In Intentional Tort Cases Arising In A Labor Context.

It is our position that the decision below is in direct conflict with the decision of this Court in Farmer v. Carpenters, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977). We understand Farmer to hold as a matter of social policy that any action alleging conduct which satisfies the elements of the tort of outrage under state law[2] is not preempted.

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[2] At least where state law defines outrage as conduct which is so outrageous that "no reasonable man in a civilized society should be expected to endure it." In the instant case, the jury was instructed under Missouri law that the conduct had to be "extreme and outrageous," and to be so, the conduct "must have been so outrageous in character and so extreme in degree as to go beyond any possible

> Regardless of whether the operation of the hiring hall was lawful or unlawful under federal statutes, there is no federal protection for conduct . . . which is so outrageous that "no reasonable man in a civilized society should be expected to endure it." Thus, ... permitting the exercise of state jurisdiction over such complaints does not result in state regulation of federally protected conduct.
>
> The State ... has a substantial interest in protecting its citizens from the kind of abuse of which Hill complained. Farmer, supra, 430 U.S. at p. 302.
>
> . . . [W]e cannot conclude that Congress intended to oust state court jurisdiction over actions for tortious activity such as that alleged in this case. Farmer, supra, 430 U.S. at p. 305.

(cont. footnote 2)

bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (Appendix A-65). It is submitted that the Missouri standard is at least as strict as that in California under which Farmer was decided.

Farmer simply does not admit of lower courts performing the Farmer analysis to arrive at varying results based on their individual perceptions of federal labor policy.[3] Yet, this is precisely what the decision below has done.

Farmer suggests that the question of preemption of jurisdiction is to be determined at the pleading stage by examining the allegations of the complaint to determine if outrageous conduct has been properly pled. If so, then the action is not preempted, and such determination would be subject to review for an abuse of discretion.

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[3] We note that this Court noted in Farmer supra, 430 U.S. at p. 296, Footnote 7:

> [W]e [cannot] proceed on a case-by-case basis to determine whether each particular final judicial pronouncement does,

Farmer was so construed by the United States District Court for the District of Kansas in this case:

> We believe that plaintiff may proceed on his claim for the allegedly outrageous conduct of Hollingsworth. The intentional tort which is alleged, we believe, falls outside the scope of the arbitration clause of the collective bargaining agreement. At the same time, it falls within the Farmer v. Carpenters exception to the preemption doctrine. Therefore, we hold that the limited claim of outrage can be maintained. (Appendix A-24 at p. A-50).

Farmer has also been so construed by the United States District Court for the District of New York:

(cont. footnote 3)

> or might reasonably be thought to, conflict in some relevant manner with federal labor policy. This court is ill-equipped to play such a role and the federal system dictates that this problem be solved with a rule capable of relatively easy application, so that lower courts may largely policy themselves in this regard.

> Both false and malicious statements and threats allegedly causing mental disturbance, if proven, may well be sufficient outrageous conduct to constitute an intentional tort justifying recovery under New York law, particularly if they were part of a deliberate campaign of harrassment and intimidation.
>
> * * *
>
> We merely hold that plaintiff's indicated conclusory allegations are sufficient to sustain state court jurisdiction and therefore to justify a remand to the Suffolk County Supreme Court for further proceedings consistent with the statements of the United States Supreme Court in its decisions in the Farmer and Linn cases and this court herein. Dazzo v. Local 259, United Auto. Aerospace, etc., 448 F.Supp. 799, 802 (D.C.N.Y. 1978).

In contrast, the Tenth Circuit below determined subject matter jurisdiction by examining evidence adduced at trial to conclude the harm of which the plaintiff complained resulted from his discharge rather than any improper conduct of Hollingsworth.

> . . . [I]t is clear to us that the harm of which he complains resulted from the fact of his discharge, rather than from any improper conduct of Sentinel's representative to which he was subjected. Mr. Viestenz testified that his physical and emotional suffering occurred after he had been fired and related to his concern with providing for his family. (R. Vol. 3, at 75-78). The harm for which Mr. Viestenz seeks recovery resulted from his discharge, the propriety of which is within the exclusive jurisdiction of the NLRB to determine. (Appendix A-1 at p. A-18-19).

The manifest unfairness in this statement to petitioner is that this factual question was disputed and was contrary to the facts found by the jury and affirmed by the District Court below. The danger in this analysis to all future litigants is that jurisdiction will turn on determination of questions of fact - by appellate judges apparently not bound to adhere to long-established maxims of appellate review.

The decision below goes on to summarily conclude that the conduct was not ". . . sufficiently outrageous to justify the potential for undue interference with the federal regulatory scheme." (Appendix A-1 at p. A-21). To all future litigants, this means that jurisdiction will turn on determination of a policy question involving federal labor law on which reasonable persons can differ. The inherent danger in the Tenth Circuit standard then, is that cases with substantially the same facts will be found to support jurisdiction in some districts but not in others. (Witness Dazzo, supra, versus the decision below).

If allowed by this court to stand, the Tenth Circuit method of determining jurisdiction will be unworkable. It will breed inconsistent results which will have substantial practical consequences

for all courts and litigants in intentional tort cases arising in a labor context.

Alternatively, even assuming the Tenth Circuit properly engaged in an analysis of factors, the decision below is nonetheless irreconcilable with Farmer. This Court has determined that permitting jurisdiction over alleged ". . . 'outrageous conduct, threats, intimidation, and words' which caused Hill to suffer 'grievous mental and emotional distress as well as great physical damage' (Farmer, 430 U.S. at p. 301) does not threaten undue interference with the federal regulatory scheme and the State does have a substantial interest in regulation of such conduct (Farmer, 430 U.S. at p. 302). Likewise, in the instant case, permitting jurisdiction over proven outrageous conduct, to-wit: a custodial interrogation in which Mr.

Viestenz was coerced into signing a false confession of theft under duress of threatened termination of employment, black-listing, court action, adverse publicity and false accusations of theft - does not threaten undue interference with the federal regulatory scheme and the State does have a substantial interest in regulation of such conduct. The decision below and Farmer are in complete conflict.

2. The Decision Below Is Not In Accord With Applicable Decisions Of This Court Because A Trial Court Can Follow The Guidelines Laid Down By This Court, Yet Still Be Found To Be Without Jurisdiction.

This court stated in Farmer, supra, 430 U.S. at p. 304 that state court tort actions can be adjudicated without resolution of the "merits" of the underlying labor dispute. In terms applicable to the instant case, a federal court sitting in diversity

need not consider, much less resolve, whether an employer wrongfully discharged an employee (Farmer, supra, 430 U.S. at p. 304); a trial court should be sensitive to the need to minimize the jury's exposure to evidence of wrongful discharge (Farmer, supra, 430 U.S. at p. 305, Footnote 13); where evidence of wrongful discharge is necessary to establish the context in which the tort claim arose, the trial court should instruct the jury that the fact of wrongful discharge should not enter into the determination of liability or damages (Farmer, supra, 430 U.S. at p. 305, Footnote 13).

The trial court understood these limitations. In denying Fleming's motion to dismiss, the trial court stated:

> Thus, plaintiff's claim for loss of employment and earnings must be limited to losses sustained because of the

> emotional distress caused by the conduct of Hollingsworth. Plaintiff cannot recover for the loss of earnings caused by his allegedly wrongful discharge.... We thus deny defendant's Motion to Dismiss, but strictly limit plaintiff's cause of action for outrage to those damages stemming directly from the conduct of Hollingsworth which are clearly separate from damages caused by plaintiff's allegedly wrongful discharge. (Appendix A-24 at p. A-52).

At trial, in chambers, the trial court reiterated:

> And further, the Court (sic) will be instructed probably more than once on the fact that we are not going to become the labor board and pass on that termination. We are not going to be passing on damages for the termination. It is whether or not you prove that there was outrageous conduct and whether or not it was the conduct of Fleming. (R.O.A. Vol. I, p. 22).

The trial court delivered on this promise. The jury was instructed on the elements of the tort of outrage - Instruction 8 (Appendix A-65); that

discharge is not the subject of this lawsuit - Instruction 9 (Appendix A-66); that if Hollingsworth committed outrageous conduct, then Fleming is liable, but if he did not, then the jury must find for Fleming - Instruction 9(a) (Appendix A-67); that damages are limited to those resulting from the tort of outrage and may not include wages lost due to plaintiff's discharge - Instruction 10 (Appendix A-67-68).

In the face of this record, the decision below applies an unprecedented scope of appellate review to overturn factual determinations as a pretext to deny subject matter jurisdiction. The Farmer guidelines followed by the trial court were unequivocally ignored. The decision below brings uncertainty and confusion to trials of all future intentional tort cases arising in a labor context, effectively undermining the stability which Farmer

3. Reliance By The Decision Below On Magnuson, An RLA Case, To Distinguish The Decision of This Court In Farmer, An NLRA Case, Was Misplaced.

The decision below relies on Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir. 1978) cert. denied, 439 U.S. 930 (1978) to distinguish this court's decision in Farmer. The Tenth Circuit below stated that although Mr. Magnuson's dispute grew out of an employment relationship under the Railway Labor Act, 45 U.S.C. §151-188, the specific preemption principle at issue was the same. (Appendix A-1 at p. A-20). This is not correct.

The preemption principles are not the same under the NLRA as under the RLA. The differences are underscored by contrasting Linn v. United Plant Guard Workers of America, 383 U.S. 53, 86 S.Ct. 657, 15 L.Ed.2d 582 (1966), a

defamation action under the NLRA which was not preempted, with Majors v. U.S. Air. Inc., 525 F.Supp. 853 (D.Md. 1981) and Carson v. Southern Ry., 494 F. Supp. 1104 (D.S.C. 1979), defamation actions under the RLA which were preempted. The difference in scope of the NLRA and the RLA has been recognized:

> In contrast to the more limited scope of the NLRA, the mandatory arbitration provisions of the Railway Labor Act were created "to provide for the prompt and orderly settlement of all disputes growing out of grievances, or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." (emphasis in original) Majors, supra, 525 F.Supp. at p. 856.

This perhaps explains this court's denial of certiorari in Magnuson, supra.

Actions such as those for the intentional torts of outrage and defamation are not preempted because the NLRB is without power to provide a remedy.

> No provision of the National Labor Relations Act protects the "outrageous conduct" complained of . . .. Farmer, supra, 430 U.S. at p. 302.
>
> * * *
>
> Whether the statements or conduct of the respondents also caused Hill severe emotional distress and physical injury would play no role in the Board's disposition of the case, and the Board could not award Hill damages for pain, suffering, or medical expenses. Farmer, supra, 430 U.S. at p. 304.

Reliance in the decision below on RLA preemption principles creates confusion with this court's NLRA preemption standard in Farmer, which only this court can resolve. A decision on the question presented in this case is important in order to prevent potential further erroneous preemptions of jurisdiction and manifest unfairness to petitioner and other litigants in similar circumstances.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner

Date:
September 15, 1982

*Counsel of Record

CERTIFICATE OF SERVICE

I, Warren W. Shaw, in compliance with Rule 28.3 and 28.5 of

this Court, hereby certify that all parties required to be served have been served by my causing Dan L. Wulz to personally hand deliver three (3) copies of the above and foregoing Petition at the office of counsel for Respondent: Charles D. McAtee, 1300 Merchants National Bank Building, Topeka, Kansas, on the 15th day of September, 1982.

Warren W. Shaw

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

(File stamped June 22, 1982)

BURTON VIESTENZ,

Plaintiff-Appellee,

v.

FLEMING COMPANIES, INC.,

Defendant-Appellant.

No. 80-1559

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. Civil Action No. 76-176-C5)

Ronald W. Fairchild (Charles D. McAtee with him on the briefs) of Eidson, Lewis, Porter & Haynes, Topeka, Kansas, for Defendant-Appellant.

Dan L. Wulz (Frederick J. Patton, II, of Jones, Schroer, Rice, Bryan & Lykins, Chartered, Topeka, Kansas, on the brief) for Plaintiff-Appellee.

Before McWilliams and McKay, Circuit Judges, and Brimmer, District Judge*.

McKay, Circuit Judge.

*Honorable Clarence A. Brimmer, Jr., United States District Judge for the District of Wyoming, sitting by designation.

Appellee Burton Viestenz, a resident of Missouri, was formerly employed at a Missouri supermarket owned by appellant, Fleming Companies, Inc. (Fleming), Kansas corporation. Based on reports that it had received, Fleming, in 1975, suspected that Mr. Viestenz had been stealing merchandise from the store on a regular basis. At that time, Sentinel Security Services, Inc. (Sentinel) was under contract to Fleming for the provision of investigative services. Sentinel is a corporate entity separate from Fleming which performs such services in many states for various clients, including Fleming.

In February 1975, at Fleming's request, a representative of Sentinel came to the supermarket where Mr. Viestenz worked to interview him concerning the theft charges. The interview lasted 25 or 30 minutes. Record, Vol. 3, p. 101. At the

conclusion of the interview, Mr. Viestenz made a handwritten statement admitting his theft of merchandise from the store. In the statement itself, he acknowledged that he was giving the statement voluntarily, without threat or promise, and that he understood that he could consult an attorney. Record, Vol. 1, at 329.

The interview was conducted in an upstairs area of the store. Only Mr. Viestenz and Sentinel's representative were present, but Mr. Viestenz was aware that he was entitled to have a union representative present, and Mr. Viestenz was not restrained or otherwise compelled to participate in the interview. Record, Vol. 3, at 110. Since Sentinel's representative died before Mr. Viestenz repudiated his statement and filed this action, we have only Mr. Viestenz' testimony as to what transpired at the interview.

Mr. Viestenz tesified that Sentinel's representative at times spoke loudly to him; at other times, he spoke softly. He did not threaten bodily harm. Record, Vol. 3, at 61, 64. However, he did engage in conduct which Mr. Viestenz characterized at trial as threatening. Specifically, he advised Mr. Viestenz of the charges and informed him that he could lose his job and be blackballed at the union if he did not admit the theft. He also stated that he could obtain a court order for a polygraph test if Mr. Viestenz would not cooperate. Record, Vol. 3, at 104-05. After the interview, Mr. Viestenz returned to work. He made restitution to Fleming in the amount of the admitted theft, and he was discharged the following day after working part of his shift.

During the trial of this action, Mr. Viestenz testified that he was so

scared after he had been fired that he was unable to sleep at night. He wondered where he was going to get money to buy groceries for his family. He hurt inside. His stomach rolled, his legs hurt, and he was so nervous that his heart was overworked. Record, Vol. 3, at 76-77. He also testified that he had not been advised that he could consult with an attorney and that he gave the statement because he did not want to lose his job. Record, Vol. 3, at 61-62.

Mr. Viestenz chose not to pursue the mandatory grievance procedure set forth in the collective bargaining agreement under which he worked. See Record, Vol. 1, at 341-42. Subsequently, members of his union, Amalgamated Meat Cutters No. 576, went on strike to protest that Mr. Viestenz had been discharged, not because of theft, but because he

previously had reported Fleming for violations of its union contract. A Missouri state court, noting that the collective bargaining agreement under which Mr. Viestenz worked provided a grievance procedure as the exclusive means for resolving his complaint, enjoined the strike. Record, Vol. 1, at 141-45.

Seventeen months after the state court's order was issued, Mr. Viestenz brought this diversity action against Fleming in the United States District Court for the District of Kansas. His complaint set forth two causes of action - wrongful discharge and intentional infliction of emotional distress (the tort of outrage). He alleged that he was entitled to recover for loss of earnings and emotional suffering.

The federal district court did not permit Mr. Viestenz to pursue his

wrongful discharge claim. To the extent that the claim was based on contract violation, its resclution was governed by the general rule that an aggrieved employee "must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress." Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965). Nor did any exception to this rule apply: the procedure set forth in the agreement was exclusive, id. at 657-58; Fleming's conduct did not constitute a repudiation of the contract's provisions, see Drake Bakeries Inc. v. Bakery Workers, 370 U.S. 254, 262-63 (1962); there was no allegation that the union failed to represent Mr. Viestenz fairly, see Vaca v. Sipes, 386 U.S. 171, 185 (1967); and Mr. Viestenz did not allege that his failure to avail himself of the grievance procedures

was based on any unwillingness of Fleming to arbitrate the dispute. See Glover v. St. Louis-San Francisco Railway, 393 U.S. 324, 330-31 (1969).

Only the collective bargaining agreement prevented Fleming from terminating Mr. Viestenz at will. Andrews v. Louisville & Nashville Railroad, 406 U.S. 320, 324 (1972). Accordingly, any claim of wrongful discharge in violation of the agreement must be brought on the basis of the agreement. Id.

However, even an employee who is terminable at will may have a tort cause of action for wrongful discharge if a significant public interest is involved. Although Mr. Viestenz' claim that he was discharged because of his union activities involves such an interest, it is also an allegation of an unfair labor practice in violation of § 8(a) of the National

Labor Relations Act, 29 U.S.C. §158(a). Dayton Tire & Rubber Co. v. NLRB, 591 F.2d 566 (10th Cir. 1979). In this area, federal labor law preempts state law, and the jurisdiction of the National Labor Relations Board is exclusive. "When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). This preemption doctrine is premised on Congress' desire to avoid conflicting rules of substantive law and remedy, thereby ensuring a consistent national labor policy. Id. at 242.

We conclude that the federal district court correctly dismissed Mr. Viestenz'

wrongful discharge claim, whether construed to sound in contract or in tort.

The district court, however, did permit Mr. Viestenz' action to proceed on his tort claim of outrage. A jury trial was held, and a verdict was returned in favor of Mr. Viestenz for $5,000 actual damages and $50,000 punitive damages. Fleming filed a motion for judgment notwithstanding the verdict, a new trial, or, in the alternative, remitt'tur. The district court denied Fleming's motion for judgment n.o.v., but, noting that the award given by the jury was grossly excessive and not supported by the evidence, granted Fleming's motion for a new trial, unless Mr. Viestenz consented to a remittitur of $2500 actual damages and $25,000 punitive damages. Record, Vol. 1, at 296. Mr. Viestenz accepted the reduced award, and an appropriate order was entered.

Fleming appeals from this final order of the district court, pursuant to 28 U.S.C. §1291, and urges this court to reverse the judgment entered against it. [1] Among the several grounds for reversal advanced by Fleming is that Mr. Viestenz actually has artfully characterized an unfair labor practice charge as a tort action for outrage and thus this claim, as well as his claim for wrongful discharge, is subject to the preemption doctrine stated in the Garmon rule. Fleming moved for dismissal on this ground, but the district court denied its motion. Record, Vol. 1, at 176-79.

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[1] Mr. Viestenz argues for dismissal of this appeal on the theory that Fleming is estopped from maintaining it because the district court granted Fleming's alternative motion for remittitur. While it is clear that a plaintiff in federal court may not appeal from a remittitur order he has

In denying Fleming's motion to dismiss, the district court relied upon an exception to the Garmon rule set forth in Farmer v. Carpenters, 430 U.S. 290 (1977). In Farmer, a member and former officer of a union brought an action against the union, charging it with "outrageous conduct, threats, intimidation, and words" causing him "grievous mental and emotional distress as well as great physical damage." Id. at 301. This challenged conduct was part of a campaign of personal abuse and harrassment, which included employment referral discrimination and was intended to punish him for complaints he made agains the union local to higher union officials.

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accepted, Donovan v. Penn Shipping Co., 429 U.S. 648, 650 (1977), it is equally clear that a defendant against whom judgment is entered may maintain an appeal after requesting and receiving a remittitur in the trial court. See Westerman v. Sears, Roebuck & Co., 577 F.2d 873 (5th Cir. 1978).

Although this conduct, occurring in the context of employment discrimination, might form the basis for an unfair labor practice charge, the Court held that the union member's claim of intentional infliction of emotional distress was not necessarily preempted by federal law, if the state had a substantial interest in regulating the challenged conduct, and its regulation did not threaten undue interference with the federal regulatory scheme. Id. at 302.

To recover for this tort, state law required the union member to prove "that the defendants intentionally and by outrageous conduct had caused him to suffer severe emotional distress." Id. at 293-94. "Severe" in this context meant

> substantial or enduring, as distinguished from trivial or transitory. It must be of such substantial quantity or enduring quality that no

> reasonable man in a civilized society should be expected to endure it. Liability does not extend to mere insults, indignities, annoyances, petty or other trivialities.

Id. at 294 (emphasis added). The Court concluded that the state indeed had a substantial interest in regulating conduct of such kind "that nc reasonable man in a civilized society should be expected to endure it." Id. at 302.

The Court reasoned that while "[t]he occurrence of the abusive conduct, with which the state tort action is concerned, in such a context of federally prohibited discrimination suggests a potential for interference with the federal scheme of regulation," Id. at 304, the concerns of the federal scheme and the state tort law are distinct. The NLRB would focus its proceeding "on whether the statements or conduct on the part of Union officials discriminated or threatened discrimination against him in employment referrals," and would not

be concerned with whether the union's conduct or statements also caused him severe emotional distress and physical injury. Id. "Conversely, the state-court tort action [could] be adjudicated without resolution of the 'merits' of the underlying labor dispute." Id. Consequently, the potential for interference with the federal scheme did not outweigh the legitimate and substantial state interest in protecting its citizens from this kind of conduct. Id.

The court, however, emphasized several limitations on this exception to the general preemption rule. Concurrent jurisdiction would not be permitted where the state interest was not substantial [2] or where emotional

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[2] Our decision rests in part on our understanding that [the state] law permits recovery only for emotional distress sustained as a result of "outrageous" conduct. The potential for

distress and anxiety resulted from actual or threatened loss of employment itself, rather than from the particularly abusive manner in which the employment loss was accomplished or threatened.[3] If either of these two conditions exists, then the potential for undue interference with the federal regulatory scheme

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(cont. footnote 2)
undue interference with federal regulation wold be intolerable if state tort recoveries could be based on thetype of robust language and clash of strong personalities that may be common-place in various labor contexts.
Farmer v. Carpenters, 430 U.S. 290, 305-06 (1977).

[3] [W]e reiterate that concurrent state-court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme. Union discrimination is employment opportunities cannot itself form the underlying "outrageous" conduct on which the state-court tort action is based; to hold otherwise would undermine the pre-emption principle. Nor can threats of such discrimination suffice to sustain state-court jurisdiction. It may well

is intolerable. Id. at 305-06. The court suggested strongly that, in the context of a labor dispute, a state's interest in regulating conduct less "outrageous" than that challenged in Farmer would not be sufficiently substantial to permit concurrent jurisdiction. Id.

Since Mr. Viestenz' state tort claim is based upon conduct occurring in the context of an unfair labor

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be that the threat, or actuality, of employment discrimination will cause a union member considerable emotional distress and anxiety. But something more is required before concurrent state-court jurisdiction can be permitted. Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.
Farmer v. Carpenters, 430 U.S. 290, 305 (1977) (note omitted).

practice, it must satisfy the requirements of the Farmer exception to the Garmon preemption rule to be actionable under federal court diversity jurisdiction. The conduct must be sufficiently "outrageous" and the harm suffered by Mr. Viestenz must have resulted from the manner in which he was interviewed or discharged, rather than from the fact of discharge itself. We conclude that Mr. Viestenz' claim fails to satisfy either of these requirements.

Relying upon Mr. Viestenz' account of the interview (as we must, since we have no other), and drawing from his account every inference favorable to him, it is clear to us that the harm of which he complains resulted from the fact of his discharge, rather than from any improper conduct of Sentinel's representative to which he was subjected. Mr. Viestenz testified that his physical and emotional

suffering occurred after he had been fired and related to his concern with providing for his family. Record, Vol. 3, at 75-78. The harm for which Mr. Viestenz seeks recovery resulted from his discharge, the propriety of which is within the exclusive jurisdiction of the NLRB to determine.[4]

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[4] In this regard, our treatment of Farmer is similar to that of the Ninth Circuit in Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir.), cert. denied, 439 U.S. 930 (1978). Magnuson was discharged from his employment as a train dispatcher for his alleged negligence in causing a collision of two trains. He claimed that he was the victim of a conspiracy among railroad personnel, including supervisory personnel, investigators, and hearing officers, to conceal the fact that railroad negligence actually caused the accident. He argued that the gist of his action was tortious infliction of emotional distress, rather than wrongful discharge, and, accordingly, was within the Farmer exception.

The Ninth Circuit did not agree. The damages which Mr. Magnuson claimed flowed from his wrongful discharge, rather than from the conduct of the alleged conspirators.

(continued on p. A-20).

Even if we assume that the harm suffered by Mr. Viestenz resulted from the conduct of Sentinel's representative rather than from the

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(continued from p. A-19).

> Every employee who believes he has a legitimate grievance will doubtless have some emotional anguish occasioned by his belief that he has been wronged. Artful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge. If the pleading of emotional injury permitted aggrieved employees to avoid the impact of [federal law] the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts, would be thwarted.

Id. at 1369. Although Mr. Magnuson's dispute grew out of an employment relationship under the Railway Labor Act, 45 U.S.C. §§151-188, the specific preemption principle at issue here is the same. In the context of protected labor activity, a state tort is actionable only if the harm is a function of the "particularly abusive manner" in which a discharge is accomplished, rather than a function of the discharge itself. Farmer v. Carpenters, 430 U.S. 290, 305 (1977).

the fact of discharge, the conduct alleged simply is not sufficiently outrageous to justify the potential for undue interference with the federal regulatory scheme. Mr. Viestenz claims that Sentinel's representative made unjustified threats to have him discharged, to blackball him at the union, and to subject him to a court-ordered polygraph examination. The state's interest in regulating this kind of conduct is not nearly as substantial as the interest of a state in regulating conduct of such kind "that no reasonable man in a civilized society should be expected to endure it." While we do not condone the behavior of Sentinel's representative, we do not think the state's interest in regulating such behavior is substantial enough to permit concurrent jurisdiction. We conclude that Mr. Viestenz' claim

does not fall within the Farmer exception and that permitting him to recover for these damages in federal court would constitute an intolerable interference with the federal regulatory scheme.

Accordingly, we hold that the district court lacked jurisdiction on this action and erred in denying Fleming's motion to dismiss on that ground. Because we have decided this case on jurisdictional grounds, it is unnecessary for us to consider Fleming's remaining arguments. [5]

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[5] Fleming urges reversal on the additional grounds that: Sentinel's representative was an independent contractor, not an employee or agent of Fleming, and that Fleming was not responsible under law for his conduct; the evidence was insufficient as a matter of law to establish a claim for the tort of outrage; and the district court erred in denying certain of Fleming's motions. In view of our resolution of the preemption issue, we find it unnecessary to reach these questions.

The judgment of the district court is hereby reversed, and the case is remanded with directions to dismiss for want of jurisdiction.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

BURTON VIESTENZ, Plaintiff,	)	
v.	)	Case No. 76-176-C5
FLEMING COMPANIES, INC., Defendant.	)	

MEMORANDUM AND ORDER

Plaintiff formerly worked at one of defendant's stores. On February 5, 1975, Plaintiff was terminated by defendant. Plaintiff contends that he was unfairly terminated for the reason that he had reported defendant's violation of certain union contract provisions. Defendant contends that plaintiff was terminated because he was stealing from the store. There is evidence in the record to support both positions. The strongest evidence in support of defendant's position is a statement signed by plaintiff in which

he admitted stealing $255 from the store. Plaintiff claims that he made this statement only because of the recklessly and negligently made false statements of Joe B. Hollingsworth, an independent contractor who did security work for defendant. Count I of plaintiff's complaint alleges that the statement was false and signed only because of coercion exerted by Joe B. Hollingsworth. Count I goes on to allege that as a result of the statement, plaintiff suffered loss of employment and humiliation, and that because of the "gross and wanton coercive treatment of plaintiff" he is entitled to punitive damages. Count II of plaintiff's complaint alleges that the conduct of Joe B. Hollingsworth was outrageous, causing plaintiff loss of earnings, embarrassment, and humiliation. Thus, although the complaint is not a model of

clarity, it appears to claim punitive and compensatory damages and proceed upon the torts of wrongful discharge and "outrage."

This diversity action has been before this Court once before. By order of July 12, 1978, this Court refused to sustain defendant's motion for summary judgment which was predicated upon the notion that because Hollingsworth was an independent contractor, defendant could not be liable for his wrongful acts.

This action now comes before the Court upon defendant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. (Doc. #31) Defendant's theory in the pending motion is that plaintiff, whose employment was governed by a collective bargaining agreement, cannot pursue a claim for damages resulting from his wrongful discharge by a suit

in this Court because he has failed to utilize the grievance and arbitration procedures of the collective bargaining agreement, which reads as follows:

> ARTICLE X - DIFFERENCES
>
> Any disagreement or difference of opinion between the Company and the Union which concerns the interpretetation or application of the terms and provisions of this contract will be considered a grievance. Such grievance shall be submitted in writing and shall clearly set forth the issues and contentions of the aggrieved parties.
>
> The Union may present a grievance. Any grievance not presented within fifteen (15) days following the event giving rise to such grievance shall be forfeited and waived by the aggrieved party, except in the case of errors in employee's pay made by the Company's payroll department. The Union representative and the Company's designated representative shall discuss and attempt to adjust such grievance.

If the Union and Company's designated representative cannot reach an adjustment within fifteen (15) days, upon request of either party the grievance shall be submitted to arbitration. The Company and the Union shall each select one representative, and the arbitrator shall be selected by mutual agreement of the two representatives first selected.

In the event these two representatives fail to agree upon an arbitrator within ten (10) days after designation of the other two representatives, then the Employer and the Union may ask, by a jointly signed letter, the Director of the Federal Mediation and Conciliation Service, Washington, D.C., to send the Union and Company representatives a list of arbiters from which the two may select the arbitrator. The arbitrator shall be impartial and possess skill and knowledge of labor-management relations. No person involved directly in the controversy under consideration shall be a representative of either party in the arbitration proceedings.

The arbitrator shall receive and consider such material evidence and contentions as

the parties may offer and shall make such independent investigation as he shall deem essential to a full understanding and determination of the issues involved. The arbitrator shall not be vested with the power to change, modify or alter any of the terms of this contract.

Grievances submitted shall not depend on or involve an issue or contention by either party which is contrary to any provision of this contract, or which involves the determination of a subject matter not covered by or arising during the term of this contract. The findings and decision of the arbitrator on all arbitrable questions shall be binding and enforceable on all parties.

It is understood and agreed that all employees within the bargaining unit covered by this contract must exercise all their rights, privileges, or necessary procedures under this contract, International and Local Union Constitution, in the settlement of any and all complaints or grievances filed by such employees before taking any action outside of the scope of this contract for the settlement of such grievances.

> It is the intention of the parties that this article shall provide a peaceful method of adjusting grievances so that there shall be no suspension or interruption of normal operations as a result of any grievance. The parties shall act in good faith in proceeding to adjust grievances in accordance with the provisions of this article.
>
> The expense of the arbitrator shall be borne equally by the parties to the arbitration. There shall be no strikes or lockouts during the term of this Agreement.

It should be noted that this Article refers to "any disagreement or difference of opinion" which "concerns the interpretation or application of the terms and provisions of this contract. If agreement between the parties cannot be reached, it is provided that "upon request of either party the grievance shall be submitted to

arbitration." Further, "all employees within the bargaining unit covered by this contract must exercise all of their rights, privileges, or necessary procedures under this contract, . . . before taking any action outside of the scope of this contract for the settlement of such grievance." On the other hand, it is also provided that "[g]rievances submitted shall not ... involve[] the determination of a subject matter not covered by ... this contract."

The essence of defendant's argument is that Article X provides a method of arbitration which must be utilized before plaintiff can bring an action for damages in this Court. Defendant relies primarily upon the legal authority of Republic Steel v. Maddox, 379 U.S.

650 (1965), which shall be discussed infra.

In response to defendant's motion, plaintiff argues that his claim is not to enforce a right under the collective bargaining contract, but to recover for an independent, intentional tort (outrage) committed by defendant. Thus, it is argued that this claim is no more covered by the collective bargaining agreement's arbitration provision than would be a claim that defendant's president physically assaulted plaintiff.

Defendant replies by arguing that plaintiff's present position is inconsistent with that taken by his union to the effect that plaintiff's discharge was governed by the collective bargaining agreement. Defendant has submitted

documents which show that soon after plaintiff's discharge, his union went out on strike in protest. Mr. Nothnagel, the Secretary-Treasurer of the local union wrote a letter to one of defendant's executives. The letter stated that it was "a grievance demand as provided for under Article 10 of the current collective bargaining contract." The defendant went into state court to enjoin the strike. The union argued that the strike should not be enjoined because defendant [who was plaintiff in that action] had "unclean hands" because it discharged plaintiff because of his union activities in violation of the collective bargaining agreement. The Missouri state court judge ruled for defendant and enjoined the strike. In findings of fact and declarations of law filed on June 3, 1975,

the court wrote:

> 1. This Court must apply federal substantive law in this case.
>
> 2. That the agreement (Joint Exhibit No. 1) provides for mandatory arbitration of disputes such as this one arising out of the discharge of Burton Veistenz [sic].
>
> 3. That the equitable principle of "clean hands" must be applied with reasonable limitations and should not be applied when the dispute which brings about the strike is the act which is the basis of a claim of lack of "clean hands" and is subject to being resolved by arbitration as provided in the union contract. Thus, the question of whether or not Burton Beistenz [sic] was treated fairly and properly must be settled in accordance with Article 10 of the agreement instead of by a strike.
>
> 4. And further the Court finds that even if the principle of "clean hands" could have been applied to the instant case, the plaintinff did not have unclean hands by virtue of having interrogated Veistenz [sic] outside the presence of a representative of defendant since Veistenz [sic] did not request representation. NLRB v. Weingarten, Inc., 43 L.Ed. 2d 171, 178 (emphasis added)

Thus, defendant argues that as early as June 3, 1975, plaintiff was clearly informed that his proper remedy was the contract grievance procedure. Defendant argues that the ruling of the Missouri state court is res judicata here.

Plaintiff's final reply brief argues that the Missouri ruling does not bar this suit on grounds of equitable estoppel, collateral estoppel, or res judicata.

With the factual background and the legal positions of the parties established, we turn to a consideration of the merits of the issues presented by the motion for dismisal.

In evaluating the legal principles involved in this motion, we reach two basic conclusions: (1) to the extent that plaintiff's complaint attempts to recover for "wrongful discharge", it is barred by

plaintiff's failure to exhaust his contractual remedies; and (2) to the extent that plaintiff's complaint attempts to recover solely for damages caused by the allegedly "outrageous" conduct of Hollingsworth, it is not barred by the existence of the collective bargaining agreement's arbitration provision.

We agree with defendant that if plaintiff were suing solely for wrongful discharge, the action would have to be dismissed. In Republic Steel v. Maddox, supra, the plaintiff brought a breach of contract action claiming that severance pay was due him under the collective bargaining agreement. The agreement contained a compulsory arbitration feature which plaintiff did not attempt to utilize. The Supreme Court held that under federal policy,

contract grievance procedures, unless specified as nonexclusive, must be exhausted before direct legal redress is sought. The Supreme Court wrote:

> As a general rule in cases to which the federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. See Humphrey v. Moore, 375 U.S. 335; Labor Board v. Miranda Fuel Co., 326 F.2d 172. But unless the contract provides otherwise, there can be no doubts that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA § 203 (d), 29 U.S.C. § 173(d); §201(c), 29 U.S.C. §171(c) (1958 ed.) [379 U.S. at 652-653]

In explaining the rationale of its decision, the Court noted:

> Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.
>
> A contrary rule which would permit an individual to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a

> uniform and exclusive method for orderly settlement of employee grivances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." Teamsters Local v. Lucas Flour Co., 369 U.S. 95, 103. [379 U.S. at 653]

See also Hines v. Anchor Motor Freight Inc., 424 U.S. 554 (1976); Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 (1972).

There are certain exceptions to the requirement of exhaustion. The first exception is where the arbitration provision, by its terms, is non-exclusive. Republic Steel v. Maddox, supra, 379 U.S. at 657-658; Orphan v. Furnco Const. Corp., 466 F.2d 795, 798 (7th Cir. 1972). This exception is not applicable here, because the wording of Article X

convinces us that arbitration was meant to be an exclusive remedy for grievances arising under the contract. The provision states that upon request of either party, the grievance shall be submitted to arbitration, and that before taking a grievance to court an employee must exercise the procedures of the contract.[1] It cannot be doubted that a claim that an employee was fired because of his union activities comes within the purview of the arbitration clause of the contract. This is especially true because federal policy mandates that doubts concerning the extent of coverage be resolved in favor of arbitration. United Steelworkers

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[1] Thus, without deciding whether the Missouri state court judgment is res judicata, we agree fully with that decision.

v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960).

The second exception to arbitration occurs where an employer's conduct constitutes a repudiation of the contract's arbitration provisions. Drake Bakeries v. Bakery Workers, 370 U.S. 254, 260-263 (1962); Beriault v. Local 40, 501 F.2d 258, 262 (9th Cir. 1974); Wyatt v. Interstate & Ocean Transport Co., 439 F.Supp. 1310, 1313 (E.D. Va. 1977). This exception is not applicable here, for the company clearly favored arbitration of the dispute surrounding plaintiff's discharge and, in fact, pressed that position in a court of law.

A third exception occurs where a union refuses to represent its employee in good faith in arbitration proceedings. Vaca v. Sipes, 386 U.S. 171, 185 (1967); Fountain v.

Safeway Stores, Inc., 555 F.2d 753, 756 n. 2 (9th Cir. 1977). Plaintiff has not alleged the applicability of this exception, and it appears that the union not only fairly represented plaintiff, but went beyond the call of duty by calling an illegal strike on his behalf.

A fourth exception exists when an employee can show that it would be futile to follow the remedies outlined in the collective bargaining contract. Glover v. St. Louis-San Francisco Ry. Co., 393 U.S. 324 (1969). In light of the employer's willingness to arbitrate, and plaintiff's failure to even attempt to utilize the grievance procedures, this exception is not applicable to the wrongful discharge claim.

With these exceptions being inapplicable, it is clear that

plaintiff cannot sue in this court alleging that his discharge was wrongful in violation of the collective bargaining agreement. That any wrongful discharge claim must be brought on the basis of the agreement appears clear, for it is the only source of plaintiff's right not to be discharged. Andrews v. Louisville & Nashville R. Co., supra, at 324; Hages v. Aliquippa & Southern R. Co., 427 F. Sup. 889, 893 (W.D. Pa. 1977). This is true because only the collective bargaining agreement prevented plaintiff from being an employee for an indefinite term who would be terminable at will for any reason, or for no reason at all. Howe v. St. Louis Union Trust Co., 392 S.W.2d 625, 627 (Mo. 1965); Smith v. Arthur C. Baue Funeral Home, 370 S.W. 2d

249, 252 (Mo. 1963); Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122, 124 (1956); 53 AM.JUR.2d Master and Servant, § 43, at 117-118 (1970); Anno., 62 A.L.R. 3d 371 (1975). See also N.L.R.B. v. Computed Time Corp., 587 F.2d 790, 795 (5th Cir. 1979).

Plaintiff's complaint, to the extent that it would attempt to state a tort cause of action for wrongful discharge, must come within the exception to the general "terminable at will" rule just stated. The few exceptions to this rule, recently discussed in our opinion in Youel v. Day & Zimmerman, No. 77-2087 (D. Kan., 2/6/79), unpublished), involve decisions in which a court has found a broader public interest involved. See Peterman v. International Brotherhood of Teamsters, 174 Cal.App.2d 184, 344 P.2d 25 (1959) (employee fired for refusing

to perjure himself in judicial proceeding as commanded by employer); Ness v. Hocks, 536 P.2d 512 (Ore. 1975) (employee fired for serving on jury against employer's wishes).

Under the facts of this case, plaintiff could hope to imbue his discharge with the interests of public policy only by relying on the claim that he was fired because of his union activities. Such a claim, howver, would obviously involve an allegation of an unfair labor practice in violation of 29 U.S.C. §§ 159(a)(1) and (3). Dayton Tire & Rubber Co. v. N.L.R.B., ___F.2d ___(10th Cir., 1/17/79). This would directly implicate the National Labor Relations Act, and place the discharge within the realm where federal labor law completely preempts state law, and N.L.R.B. jurisdiction is exclusive. 29 U.S.C. § 158(a)(3); Thomas v.

Consolidated Coal Co., 380 F.2d 69, 76 n. 7 (4th Cir. 1967), cert. denied 389 U.S. 1004, reh. denied 389 U.S. 1059 (1968).

We now turn to our second conclusion, which is that the fact that plaintiff can make no claim for wrongful discharge does not prevent plaintiff from recovering for the tort of outrage to the extent that his damages are limited solely to those caused directly by the conduct of Hollingsworth. As noted above, a tort claim for wrongful discharge in violation of a collective bargaining agreement would be preempted by federal labor law. However, the Supreme Court has recently created an exception to the preemption doctrine which is applicable here. In Farmer v. Carpenters, 430 U.S. 290, (1977), the Court held that the National Labor

Relations Act does not preempt an action for intentional infliction of emotional distress. In Farmer, plaintiff alleged that defendant union officials had discriminated against him in referrals to employers, subjected him to a campaign of personal abuse and harrassment, and engaged in threats, intimidation, and other outrageous conduct which inflicted grievous emotional distress resulting in bodily injury. The Supreme Court began its opinion by discussing the doctrine of preemption and the landmark case of San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). The Court noted that various exceptions to the preemption rule had been created over the years:

> We have refused to apply the preemption doctrine to activity that otherwise would fall within the scope of Garmon if that activity "was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling

> and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." Id., at 243-244. See, e.g., Linn v. Plant Guard Workers, 383 U.S. 53 (1966) (malicious libel); Automobile Workers v. Russell, 356 U.S. 634 (1958) (mass picketing and threats of violence); Machinists v. Gonzales, 356 U.S. 617 (1958) (wrongful expulsion from union membership). We also have refused to apply the pre-emption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." Motor Coach Employees v. Lockridge, supra, at 297-298. See Vaca v. Sipes, supra, (duty of fair representation cases). [430 U.S. at 296-297]

In extending these exceptions to cover the allegation of intentional infliction of emotional distress, the Supreme Court stressed: (1) that there is no federal protection embodied in the N.L.R.A. for conduct

on the part of union officers which is so outrageous that "no reasonable man in a civilized society should be expected to endure it"; and (2) that the State has a substantial interest in protecting its citizens from the intentional infliction of emotional distress. [430 U.S. at 302]

To ensure that the assertion of a state law cause of action for outrage did not interfere with enforcement of federal labor policies, the Court strictly limited the exception:

> Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself. [430 U.S. at 305]

See also N.L.R.B. v. Committee of Interns & Residents, 566 F.2d 810, 812 (2d Cir. 1977); Dazzo v. Local 259,

United Auto., Aerospace, etc., 448 F.Supp. 799, 802 (D.N.Y. 1978); Manchester v. Intern. Ass'n. v. Machinists, 567 S.W.2d 623, 625 (Tex.Civ.App. 1978); Cabs, Inc. v. Delivery Driv., Whsemen., & Hlprs., 566 P.2d 1078, 1080 (Colo.App. 1977).

We believe that plaintiff may proceed on his claim for the allegedly outrageous conduct of Hollingsworth. The intentional tort which is alleged we believe, falls outside the scope of the arbitration clause of the collective bargaining agreement. At the same time, it falls within the Farmer v. Carpenters exception to the pre-emption doctrine. Therefore, we hold that the limited claim of outrage can be maintained.

We stress that the cause of action must be strictly limited so that potential recovery is limited to damages stemming directly from Hollingsworth's

allegedly outrageous conduct, and does not in any way constitute an attempt to recover for wrongful discharge. Thus, plaintiff's claim for loss of employment and earnings must be limited to losses sustained because of the emotional distress caused by the conduct of Hollingsworth. Plaintiff cannot recover for the loss of earnings caused by his allegedly wrongful discharge. To allow plaintiff to recover for the latter would be to allow him to evade the bar of Republic Steel by clever pleading. The rule is clear that a plaintiff should not be allowed to cleverly disguise a cause of action for wrongful discharge and in some manner attempt to recover damages therefor, when that cause of action is barred by the Republic Steel doctrine. Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369 (9th Cir. 1978); de la Rosa Sanchez v. Eastern Airlines, Inc., 574 F.2d 29, 32 (1st Cir. 1978).

We thus deny defendant's motion to dismiss, but strictly limit plaintiff's cause of action for outrage to those damages stemming directly from the conduct of Hollingsworth which are clearly separate from damages caused by plaintiff's allegedly wrongful discharge. To emphasize this distinction, plaintiff cannot recover for the paycheck which he no longer received after being discharged by defendant. Plaintiff can recover loss of earnings if he can, for example, demonstrate that he was so upset by the conduct of Hollingsworth, that he was emotionally unable to hold a job for some period of time.[3]

IT IS SO ORDERED.

Dated this 22nd day of February, 1979, at Topeka, Kansas.

United States District Judge
Richard D. Rogers

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[3] In oral argument on this motion, the Court called the attention of counsel to the fact that Missouri law governs the outrage claim, for it appeared that counsel had not realized that fact. In supplementary briefs relative to this motion, the parties have, to some extent, discussed the question of whether plaintiff's allegations are adequate to state a claim for "outrage" under Missouri law. We do not intend to express any opinion concerning the validity of plaintiff's outrage clain, for that issue is not presented to us by the pending motion. If defendant wishes to file a motion to dismiss or for summary judgment, incorporating by reference the supplemental brief which was filed relative to this motion, it may do so. Similarly, in his response plaintiff may incorporate that portion of his supplemental brief which addressed the outrage issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BURTON VIESTENZ, Plaintiff, v. FLEMING COMPANIES, INC., Defendant.	)	No. 76-176-C5

MEMORANDUM AND ORDER

This case has come before the court for determination of the defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial or remittitur. The jury trial of this action commenced on March 6, 1980, and after four days of testimony the jury returned a verdict in favor of the plaintiff for $5,000 actual damages and $50,000 punitive damages. Plaintiff alleged that he suffered severe emotional distress as a result of the outrageous conduct of Joe B. Hollingsworth during an

interview with plaintiff on February 5, 1975, which conduct should be imputed to defendant Fleming Company. Having considered the briefs of the parties and having heard their arguments, the court finds that defendant's motion for judgment notwithstanding the verdict should be denied.

In considering a motion for judgment notwithstanding the verdict, the trial court is bound to view the evidence in the light most favorable to the party against whom the motion is made. E.g. Weeks v. Latter-Day Saints Hospital, 418 F.2d 1035 (10th Cir. 1969). The critical question is whether the record contains evidence "upon which the jury could probably find a verdict" for the non-moving party. Yazzie v. Sullivant, 561 F.2d 183 (10th Cir. 1977). This court is not free to weigh the evidence presented. Wilkin v. Sunbeam

Corp., 377 F.2d 344 (10th Cir. 1967), or to pass on the credibility of witnesses, 9 WRIGHT & MILLER, Federal Practice and Procedure §2527, or to substitute its judgment of the facts for that of the jury, Swearngin v. Sears Roebuck & Co., 376 F.2d 637 (10th Cir. 1967).

Missouri has adopted the definition of outrageous conduct given in the Restatement of Torts 2d §46, upon which the court based its Instruction (No. 8). The court instructed:

> To be extreme and outrageous, the conduct complained of must have been so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community. If a recitation of the facts to an average member of the community would arouse his resentment against the actor, then you should find defendant's conduct to have been extreme and outrageous.

Although the court may not agree with the jury's verdict, it is

not free to enter a judgment notwithstanding the verdict on that basis. The jury was free to believe the plaintiff's testimony that he was coerced into making a false statement by the actions of Joe B. Hollingsworth and the court finds that a jury could properly determine this conduct by Joe B. Hollingsworth was outrageous.

As grounds for its motion for a new trial under Rule 59, Federal Rules of Civil Procedure, defendant asserts that the court made three errors of law: (1) in holding that Fleming's duty to conduct reasonable investigations of its employees was nondelegable and instructing the jury that Fleming was liable for the acts of Joe B. Hollingsworth during his interview with plaintiff; (2) in submitting the issue of punitive damages to the jury; and (3) in denying defendant's motion in limine and subsequently

admitting evidence relating to union contract violations by defendant and plaintiff's union activities. The court has considered defndant's arguments and is not persuaded that error was committed in the challenged rulings of the court. The court therefore adopts the findings made at the time of trial on these three issues for purposes of this motion.

In addition, defendant asserts the following grounds in support of its motion for a new trial: (1) the jury's verdict was against the weight of the evidence; and (2) the damages, both actual and punitive, were excessive.

The court finds that the size of the verdict is grossly excessive and is against the weight of the evidence, and that it would be unreasonable to permit the amount of the verdict to stand.

While damages sustained by reason of emotional distress alone are incapable of precise calculation, the court feels that plaintiff's testimony as to the fear experienced by him at the time of the interview -- when he could have left the room at any time -- and the subsequent loss of sleep for a few nights, and nervousness, does not support the jury's award of $5,000 actual damages.

Ordinarily the amount of punitive damages awarded rests within the discretion of the jury, but it is subject to supervision and revision by the court to the same extent as awards of actual damages, and an award of punitive damages which is grossly excessive may be reduced by the trial court. See, e.g., Hoene v. Associated Dry Goods Corp., 487 S.W.2d 479 (Mo. 1972). While there is no fixed ratio between actual and punitive

damages that may be awarded and no fixed standard by which punitive damages can be measured, generally punitive damages must bear some relation to the injury inflicted. Beggs v. C.I.T. Credit Corp., 409 S.W. 2d 719, 724 (Mo. 1966). Since the extent and nature of the injury sustained by plaintiff was minimal and the $50,000 punitive damages assessed by the jury was grossly excessive in the court's opinion, the court finds that a reduction of the punitive damages is warranted.

Therefore, the plaintiff will be given the option of accepting a reduction of the actual damages from $5,000 to $2500 and a reduction of the punitive damages from $50,000 to $25,000 or submitting to a new trial.

IT IS THEREFORE ORDERED that the motion for judgment notwithstanding the verdict be, and it hereby is, denied.

IT IS FURTHER ORDERED that unless plaintiff remits the sum of $2500 actual damages and $25,000 punitive damages, for a total of $27,500 on the judgment entered in this case, within 10 days from April 30, 1980, the date of the court's ruling from the bench, the verdict of the jury be and the same is hereby set aside and a new trial is granted.

If plaintiff remits the sum of $2500 actual damages and $25,000 punitive damages for a total of $27,500 on the judgment entered herein, within 10 days from April 30, 1980, the date of the court's ruling from the bench, defendant's motion for a new trial is denied; and in that event, the clerk of the court is directed

to correct the judgment heretofore entered in this case so as to conform to the amount of the verdict as herein reduced.

Dated this 2nd day of May, 1980, at Kansas City, Kansas.

Dale E. Saffels
United States District Judge

United States Court of Appeals

For the Tenth Circuit

(File stamped
July 20, 1982)

May Term - June 22, 1982

Before Honorable Robert H. McWilliams, Honorable Monroe G. McKay, Circuit Judges, and Honorable Clarence A. Brimmer, Jr., District Judge.*

BURTON VIESTENZ, Plaintiff-Appellee, v. FLEMING COMPANIES, INC., Defendant-Appellant.	No. 80-1559 (D.C.No. 76-176)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded to the United States District Court for the District of Kansas with directions to dismiss for want of jurisdiction.

*Of the United States District Court for the District of Wyoming, sitting by designation.

Howard K. Phillips, Clerk

By: Robert L. Hoecker
Chief Deputy Clerk

Instruction Number 8.

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subjec to liability for such emotional distress. In considering whether the defendant is liable to the plaintiff, you should determine if the conduct of the defendant is,

One, was extreme and outrageous;

Two, was intentionally or recklessly inflicted upon the plaintiff;

Three, caused severe emotional distress to the plaintiff.

To be extreme and outrageous, the conduct complained of must have been so outrageous in character and so extreme in degree as to go beyond any possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized

community.

If a recitation of the facts to an average member of the community would arouse his resentment against the actor, then you should find defendant's conduct to have been extreme and outrageous.

Mere insults, indignities, inconsiderations, or petty oppressions are not outrageous conduct.

Instruction No. 9

You have heard evidence concerning the discharge of plaintiff Burton Viestenz by his employer, the defendant, Fleming Companies, Inc. That discharge is not the subject of this lawsuit. A different method of obtaining relief was available to Mr. Viestenz if he felt his discharge was wrongful.

Instruction Number 9-A

If you find that Joe B. Hollingsworth committed outrageous conduct to the plaintiff on or about February 5, 1975, then under the law Fleming Companies, Inc., is liable for this outrageous conduct. However, if you find that the conduct of Joe B. Hollingsworth to the plaintiff on or about February 5, 1975, was not outrageous, then you must find for the defendant.

Instruction Number 10.

If you find for the plaintiff in this case you will determine the amount of his recovery. You should allow him such amount of money as will reasonably compensate him for the damages resulting from the wrongful conduct of the defendant, if any, as outlined in Instruction Number 8.

You may allow plaintiff damages for emotional distress, if any, that he has sustained by reason of the outrageous conduct complained of by plaintiff. Any wages lost due to plaintiff's discharge by Fleming are not a factor in determining damages in this lawsuit.

29 U.S.C. § 157.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158.

> (a) It shall be an unfair labor practice for an employer -
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .;

(4) to discharge or otherwise discriminate agaginst an employee because he has filed charges or given testimony under this subchapter; ....

29 U.S.C. § 159.

(a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect; Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 160.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging

in any unfair labor practice (listing in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

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No. 82-457

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1982

BURTON VIESTENZ,
Petitioner,

v.

FLEMING COMPANIES, INC.,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Tenth Circuit

BRIEF FOR FLEMING COMPANIES, INC. IN OPPOSITION

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Date: October 8, 1982

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BRIEF FOR FLEMING COMPANIES, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is reported at 681 F.2d 699 (10th Cir. 1982), and is set forth commencing at page A-1 of the Appendix attached hereto. The pertinent opinions of the

United States District Court for the District of Kansas are unpublished and are set forth at pages A-24 and A-54 of the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was rendered on June 22, 1982, and the petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the doctrine of federal preemption concerning the primary jurisdiction of the National Labor Relations Board (NLRB) under the National Labor Relations Act (29 U.S.C.S.

§151, et seq.), specifically 29 U.S.C.S. §§157-160, pertinent portions of which are set out commencing at page A-69 of the Appendix hereto.

QUESTION PRESENTED

The issue in this case is whether the National Labor Relations Act, as amended, preempts a tort action brought in Federal Court by a union member against his employer and its representatives to recover damages for the intentional inflicting of emotional distress under state law.

STATEMENT OF THE CASE

This case involves a claim by the petitioner, Burton Viestenz, that he was coerced into signing a false confession of theft under intimidation and duress of threatened termination of employment,

black listing, court action, adverse publicity, and false accusations of theft--all in retaliation for Viestenz' reporting his employer to the union on various occasions for union contract violations. This interrogation was conducted by a representative of respondent/employer, Fleming Companies, Inc. (Fleming), one Mr. Hollingsworth of Sentinel Security Services, Inc.[1] The day after the custodial interrogation, Burton Viestenz testified that Sentinel's representative during an interview prior to the discharge at times spoke loudly to him; at other times he spoke softly. He did not

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[1]Not a question on this appeal is Fleming's claim that Hollingsworth was an independent contractor, not an employee or agent or Fleming, and that Fleming was not responsible under law for his conduct.

threaten bodily harm. (Record, Vol. 3, p. 61, 64). However, he did engage in conduct which Viestenz characterized at trial as threatening. Specifically, he advised Viestenz of the charges and informed him that he could lose his job and be blackballed at the union if he did not admit the theft. He also stated that he could obtain a court order for a polygraph test if Viestenz would not cooperate. (Record, Vol. 3, p. 104-105). After the interview, Viestenz returned to work. He made restitution to Fleming in the amount of the admitted theft, and he was discharged the following day after working part of his shift.

The jury found for the plaintiff, Burton Viestenz, and awarded $5,000 compensatory and $50,000 punitive damages.

On Fleming's motion, the District Court denied a new trial and judgment notwithstanding the verdict, stating the jury was free to believe that Viesteng was coerced into making a false statement by the actions of Hollingsworth, and specifically finding that the jury could properly determine this conduct by Hollingsworth was outrageous; however, the District Court granted a remittiter to $2,500 compensatory and $25,000 punitive damages, which plaintiff accepted. (Appendix A-54).

Fleming perfected an appeal to the United States Court of Appeals for the Tenth Circuit, urging six reasons for reversal. The Tenth Circuit reversed on the ground that the District Court was without jurisdiction because the claim did not satisfy the Tenth Circuit's view

of the requirements of the Farmer exception to the Garmon preemption rule.

ARGUMENT

Petitioner contends "that the decision below is in direct conflict with the decision of this Court" in Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977) and that Farmer holds as a matter of social policy that any action alleging conduct which satisfies the elements of the tort of outrage under state law is not preempted. (See page 9 of petitioner's brief).

Petitioner further contends that the Tenth Circuit below determined subject matter jurisdiction by examining evidence adduced at trial to conclude

the harm of which the plaintiff complained resulted from his discharge rather than any improper conduct of Hollingsworth. (See page 13 of petitioner's brief). The petitioner further contends that there is "inherent danger" in the circuit court's reviewing facts to determine whether they meet the standards set forth in Farmer, in that cases with substantially the same facts will be found to support jurisdiction in some districts but not in others. (See page 15 of petitioner's brief).

The court below has concluded that the acts of which the plaintiff complained surrounding his discharge, and which plaintiff alleges were motivated by his consistent complaining about Fleming's contract violations did not meet the exceptions set out in Farmer to the principles set forth in

San Diego Building Trades Council v. Garmon, 359 U.S. 236, 79 S.Ct. 773, 3 L.Ed. 775 (1959), and Farmer v. United Brotherhood of Carpenters & Joiners of America, Local 25, 430 U.S. 290 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977).

The facts of this case simply do not involve state law principles with only incidental conduct occurring in the course of a labor dispute which falls within the exception to the preemption rule. As stated in Farmer,

> "It is essential that that state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself."

The Tenth Circuit, on appeal, determined that the nature of the acts conducted by a representative of Fleming Companies,

Inc. did not meet any of the exceptions to the preemption doctrine as set forth in Farmer. In short, the court below accepted as true Viestenz claim that he was discharged by Fleming because of contract violations which he reported to the union following an interview during which he was charged with stealing merchandise from the store on a regular basis, told he could lose his job and be blackballed at the union if he did not admit the theft, and further, that an order could be obtained to require him to take a polygraph test if he did not cooperate.

Accordingly, the decision below applies the jurisdictional test set forth in Farmer. It is not in conflict with it. The Tenth Circuit Court of Appeals decided that the basis which Viestenz relied upon to claim a state

tort was either related to employment discrimination, or not a function of the particularly abusive manner in which the discrimination was accomplished. It therefore concluded that the facts which the jury considered to award Burton Viestenz damages failed to meet the exceptions to the preemption doctrine set forth in Garmon, i.e. viewed in the light of the discreet concerns of the federal scheme of labor regulation, the acts which Viestenz complained did not provide a sufficient basis to overcome the potential for interference with the federal scheme, and were insufficient to rise to the level of legitimate and substantial interest of the state of Kansas in protecting its citizens. The alleged state tort could not be resolved without referring to plaintiffs' claimed discharge which resulted from Viestenz

complaining to the union about Fleming's continued violation of the union contract, an activity protected by the National Labor Relations Act.

Moreover, the court below concluded that the damages which Viestenz claimed was a function of the actual or threatened discrimination (the discharge) rather than a function of any "particularly abusive manner in which the discrimination (the discharge) was accomplished."

Obviously, if a danger of state interference with national labor policy is to be averted, the exceptions set forth in Farmer must be carefully and strictly construed. If this is to be accomplished, the court applying the exception must necessarily screen facts relied upon where the alleged state tort is comingled with activity that is poten-

tially protected by the Labor Management Relations Act. When the alleged conduct "is in a manner" which is particularly abusive and provides the state with legitimate and substantial interest in protecting its citizens, the exception envisioned in Farmer applies. However, if the acts complained of fail to meet the exception to the preemption doctrine, tort state law is preempted by the Labor Management Relations Act.

Accordingly, the opinion of the Tenth Circuit Court of Appeals is not in conflict with Farmer. The opinion is an application of the Farmer standards to the doctrine established in Garmon. Its conclusion that the district court erred in asserting jurisdiction as this matter involves a labor dispute and a potential for interference with the federal scheme of labor regulation is in

keeping with this Court's decision in Garmon and Farmer.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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Attorney for Respondent,
Fleming Companies, Inc.

Dated: October 8, 1982.

CERTIFICATE OF SERVICE

I, William G. Haynes, in compliance with Rule 28.3 and 28.5 of this Court, hereby certify that three (3) copies of

the above and foregoing Brief were hand delivered to counsel for Petitioner: Warren W. Shaw, 504 Capitol Federal Building, Topeka, Kansas 66603, and Dan L. Wulz, 115 East Seventh Street, Topeka, Kansas 66603, on this 8th day of October, 1982.

William G. Haynes

William G. Haynes

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

(File stamped June 22, 1982)

BURTON VIESTENZ,
Plaintiff-Appellee,
v.
FLEMING COMPANIES, INC.,
Defendant-Appellant.

No. 80-1559

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
(D.C. Civil Action No. 76-176-C5)

Ronald W. Fairchild (Charles D. McAtee with him on the briefs) of Eidson, Lewis, Porter & Haynes, Topeka, Kansas, for Defendant-Appellant.

Dan L. Wulz (Frederick J. Patton, II, of Jones, Schroer, Rice, Bryan & Lykins, Chartered, Topeka, Kansas, on the brief) for Plaintiff-Appellee.

Before McWilliams and McKay, Circuit Judges, and Brimmer, District Judge*.

McKay, Circuit Judge.

*Honorable Clarence A. Brimmer, Jr., United States District Judge for the District of Wyoming, sitting by designation.

Appellee Burton Viestenz, a resident of Missouri, was formerly employed at a Missouri supermarket owned by appellant, Fleming Companies, Inc. (Fleming), Kansas corporation. Based on reports that it had received, Fleming, in 1975, suspected that Mr. Viestenz had been stealing merchandise from the store on a regular basis. At that time, Sentinel Security Services, Inc. (Sentinel) was under contract to Fleming for the provision of investigative services. Sentinel is a corporate entity separate from Fleming which performs such services in many states for various clients, including Fleming.

In February 1975, at Fleming's request, a representative of Sentinel came to the supermarket where Mr. Viestenz worked to interview him concerning the theft charges. The interview lasted 25 or 30 minutes. Record, Vol. 3, p. 101. At the

conclusion of the interview, Mr. Viestenz made a handwritten statement admitting his theft of merchandise from the store. In the statement itself, he acknowledged that he was giving the statement voluntarily, without threat or promise, and that he understood that he could consult an attorney. Record, Vol. 1, at 329.

The interview was conducted in an upstairs area of the store. Only Mr. Viestenz and Sentinel's representative were present, but Mr. Viestenz was aware that he was entitled to have a union representative present, and Mr. Viestenz was not restrained or otherwise compelled to participate in the interview. Record, Vol. 3, at 110. Since Sentinel's representative died before Mr. Viestenz repudiated his statement and filed this action, we have only Mr. Viestenz' testimony as to what transpired at the interview.

Mr. Viestenz tesified that Sentinel's representative at times spoke loudly to him; at other times, he spoke softly. He did not threaten bodily harm. Record, Vol. 3, at 61, 64. However, he did engage in conduct which Mr. Viestenz characterized at trial as threatening. Specifically, he advised Mr. Viestenz of the charges and informed him that he could lose his job and be blackballed at the union if he did not admit the theft. He also stated that he could obtain a court order for a polygraph test if Mr. Viestenz would not cooperate. Record, Vol. 3, at 104-05. After the interview, Mr. Viestenz returned to work. He made restitution to Fleming in the amount of the admitted theft, and he was discharged the following day after working part of his shift.

During the trial of this action, Mr. Viestenz testified that he was so

scared after he had been fired that he was unable to sleep at night. He wondered where he was going to get money to buy groceries for his family. He hurt inside. His stomach rolled, his legs hurt, and he was so nervous that his heart was overworked. Record, Vol. 3, at 76-77. He also testified that he had not been advised that he could consult with an attorney and that he gave the statement because he did not want to lose his job. Record, Vol. 3, at 61-62.

Mr. Viestenz chose not to pursue the mandatory grievance procedure set forth in the collective bargaining agreement under which he worked. See Record, Vol. 1, at 341-42. Subsequently, members of his union, Amalgamated Meat Cutters No. 576, went on strike to protest that Mr. Viestenz had been discharged, not because of theft, but because he

previously had reported Fleming for violations of its union contract. A Missouri state court, noting that the collective bargaining agreement under which Mr. Viestenz worked provided a grievance procedure as the exclusive means for resolving his complaint, enjoined the strike. Record, Vol. 1, at 141-45.

Seventeen months after the state court's order was issued, Mr. Viestenz brought this diversity action against Fleming in the United States District Court for the District of Kansas. His complaint set forth two causes of action - wrongful discharge and intentional infliction of emotional distress (the tort of outrage). He alleged that he was entitled to recover for loss of earnings and emotional suffering.

The federal district court did not permit Mr. Viestenz to pursue his

wrongful discharge claim. To the extent that the claim was based on contract violation, its resolution was governed by the general rule that an aggrieved employee "must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress." Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965). Nor did any exception to this rule apply: the procedure set forth in the agreement was exclusive, id. at 657-58; Fleming's conduct did not constitute a repudiation of the contract's provisions, see Drake Bakeries Inc. v. Bakery Workers, 370 U.S. 254, 262-63 (1962); there was no allegation that the union failed to represent Mr. Viestenz fairly, see Vaca v. Sipes, 386 U.S. 171, 185 (1967); and Mr. Viestenz did not allege that his failure to avail himself of the grievance procedures

was based on any unwillingness of Fleming to arbitrate the dispute. See Glover v. St. Louis-San Francisco Railway, 393 U.S. 324, 330-31 (1969).

Only the collective bargaining agreement prevented Fleming from terminating Mr. Viestenz at will. Andrews v. Louisville & Nashville Railroad, 406 U.S. 320, 324 (1972). Accordingly, any claim of wrongful discharge in violation of the agreement must be brought on the basis of the agreement. Id.

However, even an employee who is terminable at will may have a tort cause of action for wrongful discharge if a significant public interest is involved. Although Mr. Viestenz' claim that he was discharged because of his union activities involves such an interest, it is also an allegation of an unfair labor practice in violation of § 8(a) of the National

Labor Relations Act, 29 U.S.C. §158(a). Dayton Tire & Rubber Co. v. NLRB, 591 F.2d 566 (10th Cir. 1979). In this area, federal labor law preempts state law, and the jurisdiction of the National Labor Relations Board is exclusive. "When an activity is arguably subject to § 7 or § 8 of the [National Labor Relations] Act, the states as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 245 (1959). This preemption doctrine is premised on Congress' desire to avoid conflicting rules of substantive law and remedy, thereby ensuring a consistent national labor policy. Id. at 242.

We conclude that the federal district court correctly dismissed Mr. Viestenz'

wrongful discharge claim, whether construed to sound in contract or in tort.

The district court, however, did permit Mr. Viestenz' action to proceed on his tort claim of outrage. A jury trial was held, and a verdict was returned in favor of Mr. Viestenz for $5,000 actual damages and $50,000 punitive damages. Fleming filed a motion for judgment notwithstanding the verdict, a new trial, or, in the alternative, remittitur. The district court denied Fleming's motion for judgment n.o.v., but, noting that the award given by the jury was grossly excessive and not supported by the evidence, granted Fleming's motion for a new trial, unless Mr. Viestenz consented to a remittitur of $2500 actual damages and $25,000 punitive damages. Record, Vol. 1, at 296. Mr. Viestenz accepted the reduced award, and an appropriate order was entered.

Fleming appeals from this final order of the district court, pursuant to 28 U.S.C. §1291, and urges this court to reverse the judgment entered against it. [1] Among the several grounds for reversal advanced by Fleming is that Mr. Viestenz actually has artfully characterized an unfair labor practice charge as a tort action for outrage and thus this claim, as well as his claim for wrongful discharge, is subject to the preemption doctrine stated in the Garmon rule. Fleming moved for dismissal on this ground, but the district court denied its motion. Record, Vol. 1, at 176-79.

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[1] Mr. Viestenz argues for dismissal of this appeal on the theory that Fleming is estopped from maintaining it because the district court granted Fleming's alternative motion for remittitur. While it is clear that a plaintiff in federal court may not appeal from a remittitur order he has

In denying Fleming's motion to dismiss, the district court relied upon an exception to the Garmon rule set forth in Farmer v. Carpenters, 430 U.S. 290 (1977). In Farmer, a member and former officer of a union brought an action against the union, charging it with "outrageous conduct, threats, intimidation, and words" causing him "grievous mental and emotional distress as well as great physical damage." Id. at 301. This challenged conduct was part of a campaign of personal abuse and harrassment, which included employment referral discrimination and was intended to punish him for complaints he made agains the union local to higher union officials.

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accepted, Donovan v. Penn Shipping Co., 429 U.S. 648, 650 (1977), it is equally clear that a defendant against whom judgment is entered may maintain an appeal after requesting and receiving a remittitur in the trial court. See Westerman v. Sears, Roebuck & Co., 577 F.2d 873 (5th Cir. 1978).

Although this conduct, occurring in the context of employment discrimination, might form the basis for an unfair labor practice charge, the Court held that the union member's claim of intentional infliction of emotional distress was not necessarily preempted by federal law, if the state had a substantial interest in regulating the challenged conduct, and its regulation did not threaten undue interference with the federal regulatory scheme. Id. at 302.

To recover for this tort, state law required the union member to prove "that the defendants intentionally and by outrageous conduct had caused him to suffer severe emotional distress." Id. at 293-94. "Severe" in this context meant

> substantial or enduring, as distinguished from trivial or transitory. It must be of such substantial quantity or enduring quality that no

> reasonable man in a civilized society should be expected to endure it. Liability does not extend to mere insults, indignities, annoyances, petty or other trivialities.

Id. at 294 (emphasis added). The Court concluded that the state indeed had a substantial interest in regulating conduct of such kind "that no reasonable man in a civilized society should be expected to endure it." Id. at 302.

The Court reasoned that while "[t]he occurrence of the abusive conduct, with which the state tort action is concerned, in such a context of federally prohibited discrimination suggests a potential for interference with the federal scheme of regulation," Id. at 304, the concerns of the federal scheme and the state tort law are distinct. The NLRB would focus its proceeding "on whether the statements or conduct on the part of Union officials discriminated or threatened discrimination against him in employment referrals," and would not

be concerned with whether the union's conduct or statements also caused him severe emotional distress and physical injury. Id. "Conversely, the state-court tort action [could] be adjudicated without resolution of the 'merits' of the underlying labor dispute." Id. Consequently, the potential for interference with the federal scheme did not outweigh the legitimate and substantial state interest in protecting its citizens from this kind of conduct. Id.

The court, however, emphasized several limitations on this exception to the general preemption rule. Concurrent jurisdiction would not be permitted where the state interest was not substantial [2] or where emotional

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[2] Our decision rests in part on our understanding that [the state] law permits recovery only for emotional distress sustained as a result of "outrageous" conduct. The potential for

distress and anxiety resulted from actual or threatened loss of employment itself, rather than from the particularly abusive manner in which the employment loss was accomplished or threatened.[3] If either of these two conditions exists, then the potential for undue interference with the federal regulatory scheme

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(cont. footnote 2)
undue interference with federal regulation would be intolerable if state tort recoveries could be based on the type of robust language and clash of strong personalities that may be common-place in various labor contexts.
Farmer v. Carpenters, 430 U.S. 290, 305-06 (1977).

[3] [W]e reiterate that concurrent state-court jurisdiction cannot be permitted where there is a realistic threat of interference with the federal regulatory scheme. Union discrimination in employment opportunities cannot itself form the underlying "outrageous" conduct on which the state-court tort action is based; to hold otherwise would undermine the pre-emption principle. Nor can threats of such discrimination suffice to sustain state-court jurisdiction. It may well

is intolerable. Id. at 305-06. The court suggested strongly that, in the context of a labor dispute, a state's interest in regulating conduct less "outrageous" than that challenged in Farmer would not be sufficiently substantial to permit concurrent jurisdiction. Id.

Since Mr. Viestenz' state tort claim is based upon conduct occurring in the context of an unfair labor

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be that the threat, or actuality, of employment discrimination will cause a union member considerable emotional distress and anxiety. But something more is required before concurrent state-court jurisdiction can be permitted. Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself.
Farmer v. Carpenters, 430 U.S. 290, 305 (1977) (note omitted).

practice, it must satisfy the requirements of the Farmer exception to the Garmon preemption rule to be actionable under federal court diversity jurisdiction. The conduct must be sufficiently "outrageous" and the harm suffered by Mr. Viestenz must have resulted from the manner in which he was interviewed or discharged, rather than from the fact of discharge itself. We conclude that Mr. Viestenz' claim fails to satisfy either of these requirements.

Relying upon Mr. Viestenz' account of the interview (as we must, since we have no other), and drawing from his account every inference favorable to him, it is clear to us that the harm of which he complains resulted from the fact of his discharge, rather than from any improper conduct of Sentinel's representative to which he was subjected. Mr. Viestenz testified that his physical and emotional

suffering occurred after he had been fired and related to his concern with providing for his family. Record, Vol. 3, at 75-78. The harm for which Mr. Viestenz seeks recovery resulted from his discharge, the propriety of which is within the exclusive jurisdiction of the NLRB to determine.[4]

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[4] In this regard, our treatment of Farmer is similar to that of the Ninth Circuit in Magnuson v. Burlington Northern, Inc., 576 F.2d 1367 (9th Cir.), cert. denied, 439 U.S. 930 (1978). Magnuson was discharged from his employment as a train dispatcher for his alleged negligence in causing a collision of two trains. He claimed that he was the victim of a conspiracy among railroad personnel, including supervisory personnel, investigators, and hearing officers, to conceal the fact that railroad negligence actually caused the accident. He argued that the gist of his action was tortious infliction of emotional distress, rather than wrongful discharge, and, accordingly, was within the Farmer exception.

The Ninth Circuit did not agree. The damages which Mr. Magnuson claimed flowed from his wrongful discharge, rather than from the conduct of the alleged conspirators.

(continued on p. A-20).

Even if we assume that the harm suffered by Mr. Viestenz resulted from the conduct of Sentinel's representative rather than from the

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(continued from p. A-19).

> Every employee who believes he has a legitimate grievance will doubtless have some emotional anguish occasioned by his belief that he has been wronged. Artful pleading cannot conceal the reality that the gravamen of the complaint is wrongful discharge. If the pleading of emotional injury permitted aggrieved employees to avoid the impact of [federal law] the congressional purpose of providing a comprehensive federal scheme for the settlement of employer-employee disputes in the railroad industry, without resort to the courts, would be thwarted.

Id. at 1369. Although Mr. Magnuson's dispute grew out of an employment relationship under the Railway Labor Act, 45 U.S.C. §§151-188, the specific preemption principle at issue here is the same. In the context of protected labor activity, a state tort is actionable only if the harm is a function of the "particularly abusive manner" in which a discharge is accomplished, rather than a function of the discharge itself. Farmer v. Carpenters, 430 U.S. 290, 305 (1977).

the fact of discharge, the conduct alleged simply is not sufficiently outrageous to justify the potential for undue interference with the federal regulatory scheme. Mr. Viestenz claims that Sentinel's representative made unjustified threats to have him discharged, to blackball him at the union, and to subject him to a court-ordered polygraph examination. The state's interest in regulating this kind of conduct is not nearly as substantial as the interest of a state in regulating conduct of such kind "that no reasonable man in a civilized society should be expected to endure it." While we do not condone the behavior of Sentinel's representative, we do not think the state's interest in regulating such behavior is substantial enough to permit concurrent jurisdiction. We conclude that Mr. Viestenz' claim

does not fall within the Farmer exception and that permitting him to recover for these damages in federal court would constitute an intolerable interference with the federal regulatory scheme.

Accordingly, we hold that the district court lacked jurisdiction on this action and erred in denying Fleming's motion to dismiss on that ground. Because we have decided this case on jurisdictional grounds, it is unnecessary for us to consider Fleming's remaining arguments. [5]

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[5] Fleming urges reversal on the additional grounds that: Sentinel's representative was an independent contractor, not an employee or agent of Fleming, and that Fleming was not responsible under law for his conduct; the evidence was insufficient as a matter of law to establish a claim for the tort of outrage; and the district court erred in denying certain of Fleming's motions. In view of our resolution of the preemption issue, we find it unnecessary to reach these questions.

The judgment of the district court is hereby reversed, and the case is remanded with directions to dismiss for want of jurisdiction.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF KANSAS

BURTON VIESTENZ, Plaintiff,	)	
v.	)	Case No. 76-176-C5
FLEMING COMPANIES, INC., Defendant.	)	

MEMORANDUM AND ORDER

Plaintiff formerly worked at one of defendant's stores. On February 5, 1975, Plaintiff was terminated by defendant. Plaintiff contends that he was unfairly terminated for the reason that he had reported defendant's violation of certain union contract provisions. Defendant contends that plaintiff was terminated because he was stealing from the store. There is evidence in the record to support both positions. The strongest evidence in support of defendant's position is a statement signed by plaintiff in which

he admitted stealing $255 from the store. Plaintiff claims that he made this statement only because of the recklessly and negligently made false statements of Joe B. Hollingsworth, an independent contractor who did security work for defendant. Count I of plaintiff's complaint alleges that the statement was false and signed only because of coercion exerted by Joe B. Hollingsworth. Count I goes on to allege that as a result of the statement, plaintiff suffered loss of employment and humiliation, and that because of the "gross and wanton coercive treatment of plaintiff" he is entitled to punitive damages. Count II of plaintiff's complaint alleges that the conduct of Joe B. Hollingsworth was outrageous, causing plaintiff loss of earnings, embarrassment, and humiliation. Thus, although the complaint is not a model of

clarity, it appears to claim punitive and compensatory damages and proceed upon the torts of wrongful discharge and "outrage."

This diversity action has been before this Court once before. By order of July 12, 1978, this Court refused to sustain defendant's motion for summary judgment which was predicated upon the notion that because Hollingsworth was an independent contractor, defendant could not be liable for his wrongful acts.

This action now comes before the Court upon defendant's motion to dismiss for lack of subject matter jurisdiction and failure to state a claim. (Doc. #31) Defendant's theory in the pending motion is that plaintiff, whose employment was governed by a collective bargaining agreement, cannot pursue a claim for damages resulting from his wrongful discharge by a suit

in this Court because he has failed to utilize the grievance and arbitration procedures of the collective bargaining agreement, which reads as follows:

ARTICLE X - DIFFERENCES

Any disagreement or difference of opinion between the Company and the Union which concerns the interpretetation or application of the terms and provisions of this contract will be considered a grievance. Such grievance shall be submitted in writing and shall clearly set forth the issues and contentions of the aggrieved parties.

The Union may present a grievance. Any grievance not presented within fifteen (15) days following the event giving rise to such grievance shall be forfeited and waived by the aggrieved party, except in the case of errors in employee's pay made by the Company's payroll department. The Union representative and the Company's designated representative shall discuss and attempt to adjust such grievance.

If the Union and Company's designated representative cannot reach an adjustment within fifteen (15) days, upon request of either party the grievance shall be submitted to arbitration. The Company and the Union shall each select one representative, and the arbitrator shall be selected by mutual agreement of the two representatives first selected.

In the event these two representatives fail to agree upon an arbitrator within ten (10) days after designation of the other two representatives, then the Employer and the Union may ask, by a jointly signed letter, the Director of the Federal Mediation and Conciliation Service, Washington, D.C., to send the Union and Company representatives a list of arbiters from which the two may select the arbitrator. The arbitrator shall be impartial and possess skill and knowledge of labor-management relations. No person involved directly in the controversy under consideration shall be a representative of either party in the arbitration proceedings.

The arbitrator shall receive and consider such material evidence and contentions as

the parties may offer and shall make such independent investigation as he shall deem essential to a full understanding and determination of the issues involved. The arbitrator shall not be vested with the power to change, modify or alter any of the terms of this contract.

Grievances submitted shall not depend on or involve an issue or contention by either party which is contrary to any provision of this contract, or which involves the determination of a subject matter not covered by or arising during the term of this contract. The findings and decision of the arbitrator on all arbitrable questions shall be binding and enforceable on all parties.

It is understood and agreed that all employees within the bargaining unit covered by this contract must exercise all their rights, privileges, or necessary procedures under this contract, International and Local Union Constitution, in the settlement of any and all complaints or grievances filed by such employees before taking any action outside of the scope of this contract for the settlement of such grievances.

> It is the intention of the parties that this article shall provide a peaceful method of adjusting grievances so that there shall be no suspension or interruption of normal operations as a result of any grievance. The parties shall act in good faith in proceeding to adjust grievances in accordance with the provisions of this article.
>
> The expense of the arbitrator shall be borne equally by the parties to the arbitration. There shall be no strikes or lockouts during the term of this Agreement.

It should be noted that this Article refers to "any disagreement or difference of opinion" which "concerns the interpretation or application of the terms and provisions of this contract. If agreement between the parties cannot be reached, it is provided that "upon request of either party the grievance shall be submitted to

arbitration." Further, "all employees within the bargaining unit covered by this contract must exercise all of their rights, privileges, or necessary procedures under this contract, . . . before taking any action outside of the scope of this contract for the settlement of such grievance." On the other hand, it is also provided that "[g]rievances submitted shall not ... involve[] the determination of a subject matter not covered by ... this contract."

The essence of defendant's argument is that Article X provides a method of arbitration which must be utilized before plaintiff can bring an action for damages in this Court. Defendant relies primarily upon the legal authority of Republic Steel v. Maddox, 379 U.S.

650 (1965), which shall be discussed infra.

In response to defendant's motion, plaintiff argues that his claim is not to enforce a right under the collective bargaining contract, but to recover for an independent, intentional tort (outrage) committed by defendant. Thus, it is argued that this claim is no more covered by the collective bargaining agreement's arbitration provision than would be a claim that defendant's president physically assaulted plaintiff.

Defendant replies by arguing that plaintiff's present position is inconsistent with that taken by his union to the effect that plaintiff's discharge was governed by the collective bargaining agreement. Defendant has submitted

documents which show that soon after plaintiff's discharge, his union went out on strike in protest. Mr. Nothnagel, the Secretary-Treasurer of the local union wrote a letter to one of defendant's executives. The letter stated that it was "a grievance demand as provided for under Article 10 of the current collective bargaining contract." The defendant went into state court to enjoin the strike. The union argued that the strike should not be enjoined because defendant [who was plaintiff in that action] had "unclean hands" because it discharged plaintiff because of his union activities in violation of the collective bargaining agreement. The Missouri state court judge ruled for defendant and enjoined the strike. In findings of fact and declarations of law filed on June 3, 1975,

the court wrote:

> 1. This Court must apply federal substantive law in this case.
>
> 2. That the agreement (Joint Exhibit No. 1) provides for mandatory arbitration of disputes such as this one arising out of the discharge of Burton Veistenz [sic].
>
> 3. That the equitable principle of "clean hands" must be applied with reasonable limitations and should not be applied when the dispute which brings about the strike is the act which is the basis of a claim of lack of "clean hands" and is subject to being resolved by arbitration as provided in the union contract. Thus, the question of whether or not Burton Beistenz [sic] was treated fairly and properly must be settled in accordance with Article 10 of the agreement instead of by a strike.
>
> 4. And further the Court finds that even if the principle of "clean hands" could have been applied to the instant case, the plaintinff did not have unclean hands by virtue of having interroyated Veistenz [sic] outside the presence of a representative of defendant since Veistenz [sic] did not request representation. NLRB v. Weingarten, Inc., 43 L.Ed. 2d 171, 178 (emphasis added)

Thus, defendant argues that as early as June 3, 1975, plaintiff was clearly informed that his proper remedy was the contract grievance procedure. Defendant argues that the ruling of the Missouri state court is res judicata here.

Plaintiff's final reply brief argues that the Missouri ruling does not bar this suit on grounds of equitable estoppel, collateral estoppel, or res judicata.

With the factual background and the legal positions of the parties established, we turn to a consideration of the merits of the issues presented by the motion for dismisal.

In evaluating the legal principles involved in this motion, we reach two basic conclusions: (1) to the extent that plaintiff's complaint attempts to recover for "wrongful discharge", it is barred by

plaintiff's failure to exhaust his contractual remedies; and (2) to the extent that plaintiff's complaint attempts to recover solely for damages caused by the allegedly "outrageous" conduct of Hollingsworth, it is not barred by the existence of the collective bargaining agreement's arbitration provision.

We agree with defendant that if plaintiff were suing solely for wrongful discharge, the action would have to be dismissed. In Republic Steel v. Maddox, supra, the plaintiff brought a breach of contract action claiming that severance pay was due him under the collective bargaining agreement. The agreement contained a compulsory arbitration feature which plaintiff did not attempt to utilize. The Supreme Court held that under federal policy,

contract grievance procedures, unless specified as nonexclusive, must be exhausted before direct legal redress is sought. The Supreme Court wrote:

> As a general rule in cases to which the federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must attempt use of the contract grievance procedure agreed upon by employer and union as the mode of redress. If the union refuses to press or only perfunctorily presses the individual's claim, differences may arise as to the forms of redress then available. See Humphrey v. Moore, 375 U.S. 335; Labor Board v. Miranda Fuel Co., 326 F.2d 172. But unless the contract provides otherwise, there can be no doubts that the employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA § 203 (d), 29 U.S.C. § 173(d); §201(c), 29 U.S.C. §171(c) (1958 ed.) [379 U.S. at 652-653]

In explaining the rationale of its decision, the Court noted:

> Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. And it cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so.
>
> A contrary rule which would permit an individual to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it. In addition to cutting across the interests already mentioned, it would deprive employer and union of the ability to establish a

> uniform and exclusive method for orderly settlement of employee grivances. If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement. A rule creating such a situation "would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements." Teamsters Local v. Lucas Flour Co., 369 U.S. 95, 103. [379 U.S. at 653]

See also Hines v. Anchor Motor Freight Inc., 424 U.S. 554 (1976); Andrews v. Louisville & Nashville R. Co., 406 U.S. 320 (1972).

There are certain exceptions to the requirement of exhaustion. The first exception is where the arbitration provision, by its terms, is non-exclusive. Republic Steel v. Maddox, supra, 379 U.S. at 657-658; Orphan v. Furnco Const. Corp., 466 F.2d 795, 798 (7th Cir. 1972). This exception is not applicable here, because the wording of Article X

convinces us that arbitration was meant to be an exclusive remedy for grievances arising under the contract. The provision states that upon request of either party, the grievance shall be submitted ... to arbitration, and that before taking a grievance to court an employee must exercise the procedures of the contract.[1] It cannot be doubted that a claim that an employee was fired because of his union activities comes within the purview of the arbitration clause of the contract. This is especially true because federal policy mandates that doubts concerning the extent of coverage be resolved in favor of arbitration. United Steelworkers

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[1] Thus, without deciding whether the Missouri state court judgment is res judicata, we agree fully with that decision.

v. Warrior & Gulf Navigation Co., 363 U.S. 574, 583 (1960).

The second exception to arbitration occurs where an employer's conduct constitutes a repudiation of the contract's arbitration provisions. Drake Bakeries v. Bakery Workers, 370 U.S. 254, 260-263 (1962); Beriault v. Local 40, 501 F.2d 258, 262 (9th Cir. 1974); Wyatt v. Interstate & Ocean Transport Co., 439 F.Supp. 1310, 1313 (E.D. Va. 1977). This exception is not applicable here, for the company clearly favored arbitration of the dispute surrounding plaintiff's discharge and, in fact, pressed that position in a court of law.

A third exception occurs where a union refuses to represent its employee in good faith in arbitration proceedings. Vaca v. Sipes, 386 U.S. 171, 185 (1967); Fountain v.

Safeway Stores, Inc., 555 F.2d 753, 756 n. 2 (9th Cir. 1977). Plaintiff has not alleged the applicability of this exception, and it appears that the union not only fairly represented plaintiff, but went beyond the call of duty by calling an illegal strike on his behalf.

A fourth exception exists when an employee can show that it would be futile to follow the remedies outlined in the collective bargaining contract. Glover v. St. Louis-San Francisco Ry. Co., 393 U.S. 324 (1969). In light of the employer's willingness to arbitrate, and plaintiff's failure to even attempt to utilize the grievance procedures, this exception is not applicable to the wrongful discharge claim.

With these exceptions being inapplicable, it is clear that

plaintiff cannot sue in this court alleging that his discharge was wrongful in violation of the collective bargaining agreement. That any wrongful discharge claim must be brought on the basis of the agreement appears clear, for it is the only source of plaintiff's right not to be discharged. Andrews v. Louisville & Nashville R. Co., supra, at 324; Hages v. Aliquippa & Southern R. Co., 427 F. Sup. 889, 893 (W.D. Pa. 1977). This is true because only the collective bargaining agreement prevented plaintiff from being an employee for an indefinite term who would be terminable at will for any reason, or for no reason at all. Howe v. St. Louis Union Trust Co., 392 S.W.2d 625, 627 (Mo. 1965); Smith v. Arthur C. Baue Funeral Home, 370 S.W. 2d

249, 252 (Mo. 1963); Christy v. Petrus, 365 Mo. 1187, 295 S.W.2d 122, 124 (1956); 53 AM.JUR.2d Master and Servant, § 43, at 117-118 (1970); Anno., 62 A.L.R. 3d 371 (1975). See also N.L.R.B. v. Computed Time Corp., 587 F.2d 790, 795 (5th Cir. 1979).

Plaintiff's complaint, to the extent that it would attempt to state a tort cause of action for wrongful discharge, must come within the exception to the general "terminable at will" rule just stated. The few exceptions to this rule, recently discussed in our opinion in Youel v. Day & Zimmerman, No. 77-2087 (D. Kan., 2/6/79), unpublished), involve decisions in which a court has found a broader public interest involved. See Peterman v. International Brotherhood of Teamsters, 174 Cal.App.2d 184, 344 P.2d 25 (1959) (employee fired for refusing

to perjure himself in judicial proceeding as commanded by employer); Ness v. Hocks, 536 P.2d 512 (Ore. 1975) (employee fired for serving on jury against employer's wishes).

Under the facts of this case, plaintiff could hope to imbue his discharge with the interests of public policy only by relying on the claim that he was fired because of his union activities. Such a claim, howver, would obviously involve an allegation of an unfair labor practice in violation of 29 U.S.C. §§ 159(a)(1) and (3). Dayton Tire & Rubber Co. v. N.L.R.B., ___F.2d ___(10th Cir., 1/17/79). This would directly implicate the National Labor Relations Act, and place the discharge within the realm where federal labor law completely preempts state law, and N.L.R.B. jurisdiction is exclusive. 29 U.S.C. § 158(a)(3); Thomas v.

Consolidated Coal Co., 380 F.2d 69, 76 n. 7 (4th Cir. 1967), cert. denied 389 U.S. 1004, reh. denied 389 U.S. 1059 (1968).

We now turn to our second conclusion, which is that the fact that plaintiff can make no claim for wrongful discharge does not prevent plaintiff from recovering for the tort of outrage to the extent that his damages are limited solely to those caused directly by the conduct of Hollingsworth. As noted above, a tort claim for wrongful discharge in violation of a collective bargaining agreement would be preempted by federal labor law. However, the Supreme Court has recently created an exception to the preemption doctrine which is applicable here. In Farmer v. Carpenters, 430 U.S. 290, (1977), the Court held that the National Labor

Relations Act does not preempt an action for intentional infliction of emotional distress. In Farmer, plaintiff alleged that defendant union officials had discriminated against him in referrals to employers, subjected him to a campaign of personal abuse and harrassment, and engaged in threats, intimidation, and other outrageous conduct which inflicted grievous emotional distress resulting in bodily injury. The Supreme Court began its opinion by discussing the doctrine of preemption and the landmark case of San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959). The Court noted that various exceptions to the preemption rule had been created over the years:

> We have refused to apply the preemption doctrine to activity that otherwise would fall within the scope of Garmon if that activity "was a merely peripheral concern of the Labor Management Relations Act . . . [or] touched interests so deeply rooted in local feeling

> and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act." Id., at 243-244. See, e.g., Linn v. Plant Guard Workers, 383 U.S. 53 (1966) (malicious libel); Automobile Workers v. Russell, 356 U.S. 634 (1958) (mass picketing and threats of violence); Machinists v. Gonzales, 356 U.S. 617 (1958) (wrongful expulsion from union membership). We also have refused to apply the pre-emption doctrine "where the particular rule of law sought to be invoked before another tribunal is so structured and administered that, in virtually all instances, it is safe to presume that judicial supervision will not disserve the interests promoted by the federal labor statutes." Motor Coach Employees v. Lockridge, supra, at 297-298. See Vaca v. Sipes, supra, (duty of fair representation cases). [430 U.S. at 296-297]

In extending these exceptions to cover the allegation of intentional infliction of emotional distress, the Supreme Court stressed: (1) that there is no federal protection embodied in the N.L.R.A. for conduct

on the part of union officers which is so outrageous that "no reasonable man in a civilized society should be expected to endure it"; and (2) that the State has a substantial interest in protecting its citizens from the intentional infliction of emotional distress. [430 U.S. at 302]

To ensure that the assertion of a state law cause of action for outrage did not interfere with enforcement of federal labor policies, the Court strictly limited the exception:

> Simply stated, it is essential that the state tort be either unrelated to employment discrimination or a function of the particularly abusive manner in which the discrimination is accomplished or threatened rather than a function of the actual or threatened discrimination itself. [430 U.S. at 305]

See also N.L.R.B. v. Committee of Interns & Residents, 566 F.2d 810, 812 (2d Cir. 1977); Dazzo v. Local 259,

United Auto., Aerospace, etc., 448 F.Supp. 799, 802 (D.N.Y. 1978); Manchester v. Intern. Ass'n. v. Machinists, 567 S.W.2d 623, 625 (Tex.Civ.App. 1978); Cabs, Inc. v. Delivery Driv., Whsemen., & Hlprs., 566 P.2d 1078, 1080 (Colo.App. 1977).

We believe that plaintiff may proceed on his claim for the allegedly outrageous conduct of Hollingsworth. The intentional tort which is alleged we believe, falls outside the scope of the arbitration clause of the collective bargaining agreement. At the same time, it falls within the Farmer v. Carpenters exception to the pre-emption doctrine. Therefore, we hold that the limited claim of outrage can be maintained.

We stress that the cause of action must be strictly limited so that potential recovery is limited to damages stemming directly from Hollingsworth's

allegedly outrageous conduct, and does not in any way constitute an attempt to recover for wrongful discharge. Thus, plaintiff's claim for loss of employment and earnings must be limited to losses sustained because of the emotional distress caused by the conduct of Hollingsworth. Plaintiff cannot recover for the loss of earnings caused by his allegedly wrongful discharge. To allow plaintiff to recover for the latter would be to allow him to evade the bar of Republic Steel by clever pleading. The rule is clear that a plaintiff should not be allowed to cleverly disguise a cause of action for wrongful discharge and in some manner attempt to recover damages therefor, when that cause of action is barred by the Republic Steel doctrine. Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369 (9th Cir. 1978); de la Rosa Sanchez v. Eastern Airlines, Inc., 574 F.2d 29, 32 (1st Cir. 1978).

We thus deny defendant's motion to dismiss, but strictly limit plaintiff's cause of action for outrage to those damages stemming directly from the conduct of Hollingsworth which are clearly separate from damages caused by plaintiff's allegedly wrongful discharge. To emphasize this distinction, plaintiff cannot recover for the paycheck which he no longer received after being discharged by defendant. Plaintiff can recover loss of earnings if he can, for example, demonstrate that he was so upset by the conduct of Hollingsworth, that he was emotionally unable to hold a job for some period of time.[3]

IT IS SO ORDERED.

Dated this 22nd day of February, 1979, at Topeka, Kansas.

United States District Judge
Richard D. Rogers

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[3] In oral argument on this motion, the Court called the attention of counsel to the fact that Missouri law governs the outrage claim, for it appeared that counsel had not realized that fact. In supplementary briefs relative to this motion, the parties have, to some extent, discussed the question of whether plaintiff's allegations are adequate to state a claim for "outrage" under Missouri law. We do not intend to express any opinion concerning the validity of plaintiff's outrage claim, for that issue is not presented to us by the pending motion. If defendant wishes to file a motion to dismiss or for summary judgment, incorporating by reference the supplemental brief which was filed relative to this motion, it may do so. Similarly, in his response plaintiff may incorporate that portion of his supplemental brief which addressed the outrage issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

BURTON VIESTENZ, Plaintiff, v. FLEMING COMPANIES, INC., Defendant.	)	No. 76-176-C5

MEMORANDUM AND ORDER

This case has come before the court for determination of the defendant's motion for judgment notwithstanding the verdict or, in the alternative, for a new trial or remittitur. The jury trial of this action commenced on March 6, 1980, and after four days of testimony the jury returned a verdict in favor of the plaintiff for $5,000 actual damages and $50,000 punitive damages. Plaintiff alleged that he suffered severe emotional distress as a result of the outrageous conduct of Joe B. Hollingsworth during an

interview with plaintiff on February 5, 1975, which conduct should be imputed to defendant Fleming Company. Having considered the briefs of the parties and having heard their arguments, the court finds that defendant's motion for judgment notwithstanding the verdict should be denied.

In considering a motion for judgment notwithstanding the verdict, the trial court is bound to view the evidence in the light most favorable to the party against whom the motion is made. E.g. Weeks v. Latter-Day Saints Hospital, 418 F.2d 1035 (10th Cir. 1969). The critical question is whether the record contains evidence "upon which the jury could probably find a verdict" for the non-moving party. Yazzie v. Sullivant, 561 F.2d 183 (10th Cir. 1977). This court is not free to weigh the evidence presented. Wilkin v. Sunbeam

Corp., 377 F.2d 344 (10th Cir. 1967), or to pass on the credibility of witnesses, 9 WRIGHT & MILLER, Federal Practice and Procedure §2527, or to substitute its judgment of the facts for that of the jury, Swearngin v. Sears Roebuck & Co., 376 F.2d 637 (10th Cir. 1967).

Missouri has adopted the definition of outrageous conduct given in the Restatement of Torts 2d §46, upon which the court based its Instruction (No. 8). The court instructed:

> To be extreme and outrageous, the conduct complained of must have been so outrageous in character, and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community. If a recitation of the facts to an average member of the community would arouse his resentment against the actor, then you should find defendant's conduct to have been extreme and outrageous.

Although the court may not agree with the jury's verdict, it is

not free to enter a judgment notwithstanding the verdict on that basis. The jury was free to believe the plaintiff's testimony that he was coerced into making a false statement by the actions of Joe B. Hollingsworth and the court finds that a jury could properly determine this conduct by Joe B. Hollingsworth was outrageous.

As grounds for its motion for a new trial under Rule 59, Federal Rules of Civil Procedure, defendant asserts that the court made three errors of law: (1) in holding that Fleming's duty to conduct reasonable investigations of its employees was nondelegable and instructing the jury that Fleming was liable for the acts of Joe B. Hollingsworth during his interview with plaintiff; (2) in submitting the issue of punitive damages to the jury; and (3) in denying defendant's motion in limine and subsequently

admitting evidence relating to union contract violations by defendant and plaintiff's union activities. The court has considered defndant's arguments and is not persuaded that error was committed in the challenged rulings of the court. The court therefore adopts the findings made at the time of trial on these three issues for purposes of this motion.

In addition, defendant asserts the following grounds in support of its motion for a new trial: (1) the jury's verdict was against the weight of the evidence; and (2) the damages, both actual and punitive, were excessive.

The court finds that the size of the verdict is grossly excessive and is against the weight of the evidence, and that it would be unreasonable to permit the amount of the verdict to stand.

While damages sustained by reason of emotional distress alone are incapable of precise calculation, the court feels that plaintiff's testimony as to the fear experienced by him at the time of the interview -- when he could have left the room at any time -- and the subsequent loss of sleep for a few nights, and nervousness, does not support the jury's award of $5,000 actual damages.

Ordinarily the amount of punitive damages awarded rests within the discretion of the jury, but it is subject to supervision and revision by the court to the same extent as awards of actual damages, and an award of punitive damages which is grossly excessive may be reduced by the trial court. See, e.g., Hoene v. Associated Dry Goods Corp., 487 S.W.2d 479 (Mo. 1972). While there is no fixed ratio between actual and punitive

damages that may be awarded and no fixed standard by which punitive damages can be measured, generally punitive damages must bear some relation to the injury inflicted. Beggs v. C.I.T. Credit Corp., 409 S.W. 2d 719, 724 (Mo. 1966). Since the extent and nature of the injury sustained by plaintiff was minimal and the $50,000 punitive damages assessed by the jury was grossly excessive in the court's opinion, the court finds that a reduction of the punitive damages is warranted.

Therefore, the plaintiff will be given the option of accepting a reduction of the actual damages from $5,000 to $2500 and a reduction of the punitive damages from $50,000 to $25,000 or submitting to a new trial.

IT IS THEREFORE ORDERED that the motion for judgment notwithstanding the verdict be, and it hereby is, denied.

IT IS FURTHER ORDERED that unless plaintiff remits the sum of $2500 actual damages and $25,000 punitive damages, for a total of $27,500 on the judgment entered in this case, within 10 days from April 30, 1980, the date of the court's ruling from the bench, the verdict of the jury be and the same is hereby set aside and a new trial is granted.

If plaintiff remits the sum of $2500 actual damages and $25,000 punitive damages for a total of $27,500 on the judgment entered herein, within 10 days from April 30, 1980, the date of the court's ruling from the bench, defendant's motion for a new trial is denied; and in that event, the clerk of the court is directed

to correct the judgment heretofore entered in this case so as to conform to the amount of the verdict as herein reduced.

Dated this 2nd day of May, 1980, at Kansas City, Kansas.

Dale E. Saffels

United States District Judge

United States Court of Appeals

For the Tenth Circuit

(File stamped
July 20, 1982)

May Term - June 22, 1982

Before Honorable Robert H. McWilliams, Honorable Monroe G. McKay, Circuit Judges, and Honorable Clarence A. Brimmer, Jr., District Judge.*

BURTON VIESTENZ, Plaintiff-Appellee, v. FLEMING COMPANIES, INC., Defendant-Appellant.	No. 80-1559 (D.C.No. 76-176)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Kansas, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded to the United States District Court for the District of Kansas with directions to dismiss for want of jurisdiction.

*Of the United States District Court for the District of Wyoming, sitting by designation.

Howard K. Phillips, Clerk

By: Robert L. Hoecker
Chief Deputy Clerk

Instruction Number 8.

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subjec to liability for such emotional distress. In considering whether the defendant is liable to the plaintiff, you should determine if the conduct of the defendant is,

One, was extreme and outrageous;

Two, was intentionally or recklessly inflicted upon the plaintiff;

Three, caused severe emotional distress to the plaintiff.

To be extreme and outrageous, the conduct complained of must have been so outrageous in character and so extreme in degree as to go beyond any possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized

community.

If a recitation of the facts to an average member of the community would arouse his resentment against the actor, then you should find defendant's conduct to have been extreme and outrageous.

Mere insults, indignities, inconsiderations, or petty oppressions are not outrageous conduct.

Instruction No. 9

You have heard evidence concerning the discharge of plaintiff Burton Viestenz by his employer, the defendant, Fleming Companies, Inc. That discharge is not the subject of this lawsuit. A different method of obtaining relief was available to Mr. Viestenz if he felt his discharge was wrongful.

Instruction Number 9-A

If you find that Joe B. Hollingsworth committed outrageous conduct to the plaintiff on or about February 5, 1975, then under the law Fleming Companies, Inc., is liable for this outrageous conduct. However, if you find that the conduct of Joe B. Hollingsworth to the plaintiff on or about February 5, 1975, was not outrageous, then you must find for the defendant.

Instruction Number 10.

If you find for the plaintiff in this case you will determine the amount of his recovery. You should allow him such amount of money as will reasonably compensate him for the damages resulting from the wrongful conduct of the defendant, if any, as outlined in Instruction Number 8.

You may allow plaintiff damages for emotional distress, if any, that he has sustained by reason of the outrageous conduct complained of by plaintiff. Any wages lost due to plaintiff's discharge by Fleming are not a factor in determining damages in this lawsuit.

29 U.S.C. § 157.

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 158.

> (a) It shall be an unfair labor practice for an employer -
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .;

(4) to discharge or otherwise discriminate agaginst an employee because he has filed charges or given testimony under this subchapter; ....

29 U.S.C. § 159.

(a) Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect; Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

29 U.S.C. § 160.

(a) The Board is empowered, as hereinafter provided, to prevent any person from engaging

in any unfair labor practice (listing in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise; provided, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter or has received a construction inconsistent therewith.

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